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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 11

NATHANIEL HARRIS, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 31, 1957
CERTIORARI GRANTED JUNE 30, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. A] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 28525 (3)

Harper, J.

UNITED STATES OF AMERICA, Plaintiff,

v.

NATHANIEL HARRIS, CLARENCE ROBINSON and GLADYS STAMPS, Defendants.

INDICTMENT—Filed February 17, 1956

The Grand Jury charges:

That on or about the 8th day of February, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri,

NATHANIEL HARRIS,
CLARENCE ROBINSON
and
GLADYS STAMPS,

the defendants, did unlawfully purchase from a person whose name is to the Grand Jury unknown, at and for a price and sum unknown, a certain narcotic drug, to wit, 224 grains, more or less, of heroin, which said narcotic drug defendants did purchase other than in or from the original stamped package containing the same.

In violation of Section 4704(a), Title 26, United States Code.

SECOND COUNT

The Grand Jury further charges:

That on or about the 8th day of February, 1956, in the City of St. Louis, in the State of Missouri, within the East-

ern Division of the Eastern District of Missouri, Nathaniel Harris, Clarence Robinson and Gladys Stamps, the defendants, did receive and conceal, and facilitate the concealment of, a certain narcotic drug, to wit, 224 grains, more or [fol. B] less, of heroin; they, the said defendants, then knowing said narcotic drug had been imported into the United States of America contrary to law.

In violation of Section 174, Title 21, United States Code.

A True Bill.

LEO MILTON ZILLIKEN
Foreman

HARRY RICHARDS
United States Attorney

* * * * * * *

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DIVISION OF MISSOURI
EASTERN DISTRICT

No. 28525 (3)

UNITED STATES OF AMERICA, Plaintiff,

vs.

NATHANIEL HARRIS, CLARENCE ROBINSON and GLADYS STAMPS, Defendants.

Transcript of Proceedings

Be It Remembered, that beginning on Monday, April 16, 1956, at ten o'clock a. m., the above entitled cause came on regularly for trial before the Honorable Roy W. Harper, District Judge, and a jury duly impaneled.

APPEARANCES:

The Plaintiff was represented by Mr. Robert Tucker, Assistant United States District Attorney.

The Defendants Nathaniel Harris and Gladys Stamps were represented by Mr. Robert E. Wilson, 4332a Easton Avenue, St. Louis, Missouri.

The Defendant Clarence Robinson was represented by Mr. Alphonse J. Lynch, 2316 Market Street, St. Louis, Missouri.

Whereupon, the following proceedings were had and entered of record:

* * * * * * *

[fol. 12]

Plaintiff's Case

Whereupon, plaintiff, to sustain the issues in its behalf, offered testimony, oral and documentary, and made admissions as follows, to-wit:

WILLIAM H. SHALLER, being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Tucker:

Q. Will you state your name, sir?
A. William H. Shaller.
[fol. 13] Q. Where do you live, Mr. Shaller?
A. Minneapolis, Minnesota.
Q. What is your profession and occupation, sir?
A. United States chemist.
Q. How long have you been employed as a United States chemist?
A. Fourteen years.
Q. How long have you been a chemist up in Minneapolis?
A. Since November 8, 1955.
Q. Where were you employed before then?
A. Kansas City, Missouri.
Q. As a United States chemist?
A. Yes, sir.
Q. Do you have any professional training, sir, leading to a career in chemistry?
A. I do, sir, I have a bachelor of science degree in chemistry and pharmacy.

Q. Are you a registered pharmacist?

A. Yes, sir.

Q. Where?

A. In Missouri and Kansas, by examination.

Q. Mr. Shaller, you in your profession as a United States chemist are called upon to perform analyses of material to determine the narcotic content of any sample submitted to you?

[fol. 14] A. I am.

Q. How often are you required to perform such analyses?

A. Quite often, almost daily, when I'm at the laboratory.

Q. How many such analyses would you say you have made since you have been a United States chemist?

A. Thousands, tens of thousands.

Q. Have you in response to a subpoena brought certain exhibits?

A. I have.

(Articles, handed to the reporter, were marked for identification as "Plaintiff's Exhibits 1 and 2, 4/16/56, OP.")

Q. Mr. Shaller, I will show you what for identification has been marked as Government's Exhibit 1, and ask you if you know what that is?

A. Yes, I do.

Mr. Lynch: I am going to object to any testimony from the identification of this as being material to this case as against this defendant Robinson on the basis that there has been no testimony giving such basis as to what it is, and any chain of custody, qualification whatsoever.

The Court: Be overruled. It will be understood, however, that unless it is connected up that the court itself will later strike it out on its own motion.

By Mr. Tucker:

Q. What is Government's Exhibit 1?

A. It is a locked envelope received by registered mail [fol. 15] No. 199033, received in the St. Paul laboratory on February 13, 1956, analyzed on February 14, 1956 by myself.

Q. How many packages does that exhibit contain?

A. Two.

Q. Would you open the package? (Witness opens package.) After you received the big envelope, Exhibit 1, in St. Paul, what did you do with it?

A. I gave it the laboratory numbers 3463 and 3464.

Q. After you gave it the laboratory numbers, what did you do then, sir?

A. I placed it in the safe for that day until I analyzed it the next day.

Q. Did you personally analyze the contents of it the next day, sir?

A. I did.

Q. I will show you a small glassine envelope and a piece of paper and ask you if that is one of the exhibits you gave a laboratory number to?

A. It is.

Q. Which exhibit is that?

A. 3464.

Q. What did your analysis show that to contain?

A. 38.8 grains of heroin hydrochloride, a derivative of opium.

Q. Did you make a quanitative (sic) and qualitative [fol. 16] analysis of that, sir?

Q. I did, sir. 10.86 per cent anhydrous narcotic alkaloid.

Q. I will show you a green cardboard package containing a white piece of paper with a rubber band around it and ask you if that is one of the exhibits you gave a laboratory number to?

A. It is. It is 169 capsules weighing 182.6 grains net of heroin hydrochloride, a derivative of opium.

Q. You made a quanitative (sic) and qualitative analysis of those capsules?

A. Yes, sir. 12.77 per cent anhydrous narcotic alkaloid, heroin.

Q. Now, sir, after you made your analysis of these two packages in Government's Exhibit 1, what did you do then?

A. I resealed them with my wax stamp and placed them in the vault.

Q. How long had they been in the vault?

A. Since I removed them yesterday.

Q. Been in your custody all that time?

A. They have, sir.

Q. Now, sir, I will show you what has been marked for identification as Government's Exhibit 2, and ask you if you have seen that?

A. I have.

Q. What is that?

A. That is a lock-sealed envelope received under the [fol. 17] registered mail No. 199033 on the 13th day of February, 1956, analyzed on the 14th day of February, 1956.

Mr. Lynch: We are going to object to the testimony from the exhibit for the same reason as given in the objection to the testimony on Exhibit 1.

The Court: Same ruling. Unless they are connected up, the court on its own motion will strike them out. It is understood the government will have to connect them up.

By Mr. Tucker:

Q. Now, sir, when you received that Government's Exhibit 2, what did you do with it, sir?

A. I gave it a laboratory number 3465, and placed it in the vault until the next day when I was able to analyze it.

Q. Sir, I ask you to open that envelope. (Witness opens envelope.) This envelope containing a piece of white paper with staples in it, you have seen that before, sir?

A. I have, sir.

Q. Did you make an analysis of the contents of that piece of paper, sir?

A. I did. I found it contained 5 capsules weighing 7.2 grains net, and it contained heroin hydrochloride, a derivative of opium.

Q. You made a qualitative and quanitative (sic) analysis?

A. I did not, sir, on a small quantity.

Q. It does contain heroin hydrochloride?

A. It does.

[fol. 18] Q. When you were through with your analysis, what did you do with it?

A. I resealed it with my stamp and wax seal and placed it in the vault.

Q. How long has it been in the vault?

A. Since I took it out yesterday to remove it and brought it in my personal custody here.

Q. It has been in your personal custody ever since that time, sir?

A. It has.

Mr. Tucker: Cross-examine.

Cross examination.

By Mr. Wilson:

Q. Mr. Shaller, how many people work in your office in Minneapolis?

A. There are four of us.

Q. Who is in charge of that office, sir?

A. Mr. G. D. Williams.

Q. Williams?

A. Yes, sir.

Q. Just what is your specific job in that office, sir?

A. Chemist.

Q. As a chemist?

A. Yes, sir.

Q. Whose job is it in that office to receive mail that [fol. 19] comes in, sir?

A. Mail as it comes in, who is ever present.

Q. I see. And on the 13th day of February, 1956, did you personally receive these two government's exhibits?

A. No, sir.

Q. Do you know who did receive them?

A. Mr. G. D. Williams, who is chemist in charge.

Q. What time do you get to work in the morning?

A. 7:45.

Q. What time does the mail arrive, sir, do you know?

A. 8:15, about 11:30 and about 3:30.

Q. Do you know what time of day these two government's exhibits arrived, sir?

A. I do not.

Q. Do you know what Mr. Williams did with those exhibits when he first received them?

A. Yes, sir.

Q. Did you see him receive them, sir?

A. No, sir.

Q. How long after he had received them did you see those exhibits?

A. I would say a matter of fifteen minutes.

Q. Do you know what happened to those exhibits between the time they were received and the fifteen minutes when you saw them?

[fol. 20] A. Yes, sir, in that fifteen minutes that expired, G. D. Williams as chemist in charge signed the registry for them and left them on his desk until I was called in and presented with them.

Q. Where were you during this fifteen minutes?

A. In the laboratory.

Q. Were you busily engaged at some job or another?

A. Yes, sir.

Q. Did you have these government's exhibits under constant surveillance during the time you were busily engaged doing something else, sir?

A. Not before they were presented to me, sir.

Q. I see. So, as a matter of fact, you really wouldn't know whether those objects had been removed from Mr. Williams' desk during the fifteen minutes before you received them, is that right, sir?

A. As a whole, unopened, yes, that is true.

Q. Now, what is true? I don't understand what you are saying is true.

A. I personally opened the locked envelopes.

Q. Now, sir, I ask you do you know whether or not during the fifteen minutes that they were on Mr. Williams' desk, whether or not anyone removed them and replaced them there?

A. No, I do not.

Q. You do not know. Is there a possibility that could [fol. 21] have been done?

A. Could have been a possibility that three other people handled them.

Q. If I understand you correctly, sir, after these packages were turned over to you, you personally opened them?

A. I did.

Q. And you gave them numbers?

A. Yes, sir.

Q. One being 3464, containing two packages, is that right?

A. 3463 and 3464 and 3465.

Q. I see. In other words, Government's Exhibit 1 consisted of two packages, one being 3463 and 3464?

A. That is true.

Q. And the other one being 3465?

A. Right.

Q. After numbering those packages, you resealed them and placed them in the vault?

A. No, sir, I didn't reseal them.

Q. You didn't reseal them, but you did place them in the vault for the balance of that day?

A. Yes, sir.

Q. On the 14th of the month, you took them out of the vault?

A. I did.

Q. Now, does anyone else have access to that vault other [fol. 22] than you?

A. They do.

Q. How many have access to that vault?

A. Two others.

Q. Who are those two others?

A. Mr. G. D. Williams, chemist in charge, and Mr. T. J. Schmere, the other chemist.

Q. He is another chemist. What time on the 14th did you go back and reopen the vault and analyze the packages?

A. I would say 8:00 a.m., five minutes after 8:00 a.m.

Q. Were you the first person at work on the 14th of that month?

A. No, sir.

Q. Do you know who was there first?

A. Not positively, but I would say Mr. Schmere was.

Q. All right. Now, who opens the vault generally in the morning?

A. Any of the three of us that have business in the vault.

Q. Was the vault open when you arrived at work that morning?

A. I do not recall.

Q. You do not recall?

A. No.

Q. Possibility it could have been?

A. Yes, it could have been.

[fols. 23 & 24] Mr. Wilson: I have no further questions.

Mr. Lynch: No questions, your Honor.

I would like to at this time renew our motion to rule the matter out of evidence and the jury be instructed to disregard it.

Mr. Wilson: The same as to defendants Harris and Stamps.

The Court: Be overruled. It is understood, however, unless it is connected up the court on its own motion will strike it and will so instruct the jury.

Do you have any more questions?

Mr. Tucker: No, sir.

The Court: Stand aside.

(Witness excused.)

The Court: During the noon hour, ladies and gentlemen of the jury, do not discuss the case among yourselves, talk to anyone about it or let anyone talk to you about it.

Announce a recess until 2:00 o'clock.

(Whereupon, the jury being duly admonished, the court stood at recess until 2:00 o'clock p.m. of said Monday, April 16, 1956.)

[fol. 25] AFTERNOON SESSION, MONDAY, APRIL 16, 1956.

Pursuant to adjournment as aforesaid, at 2:00 o'clock p.m. of said Monday, April 16, 1956, the court met, present and presiding as before, and the trial continued as follows:

The Court: Call your nest (sic) witness.

NATHANIEL ROBINSON, JR., being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Tucker:

Q. Will you state your name, please?
A. Nathaniel Robinson, Jr.
Q. Where do you live, Mr. Robinson?

A. 1243 Flagstone.

Q. What is your occupation, sir?

A. I'm a policeman, Metropolitan Police Department, St. Louis, Missouri.

Q. How long have you been a police officer, sir?

A. Five and a half years.

Q. Five and a half years?

A. That's right.

Q. Are you a graduate of the St. Louis Academy, sir?

A. Yes, I am.

Q. In training to become a police officer at the St. Louis Police Academy, do they give courses over there in narcotic [fol. 26] traffic?

A. Yes, they do.

Q. Do they teach you anything at the Police Academy about the administration and appearance of heroin, sir?

A. Yes, they do.

Q. Since your graduation from the Police Academy, where have you been stationed?

A. I have been stationed at the Tenth District excepting for my time in service.

Q. You have been at the Tenth District all the time?

A. That's right.

Q. That is Deer and Easton?

A. Deer and Easton.

Q. Do you know how heroin is administered, sir?

Mr. Wilson: I object to that, immaterial and irrelevant. Doesn't tend to prove or disprove any issued (sic) in this case.

The Court: Be sustained.

By Mr. Tucker:

Q. Do you know the defendants in this case, Clarence Robinson, Nathaniel Harris and Gladys Stamps?

A. Yes, I do.

Q. Do you see them in the courtroom, sir?

A. Yes, I do.

Q. Where is Nathaniel Harris?

A. Nathaniel Harris is seated on my right; Gladys Stamps is between he and Clarence Robinson.

[fol. 27] Q. Clarence Robinson——

A. Is on the end in the suede jacket.

Q. And what is Nathaniel Harris wearing?

A. Nathaniel Harris is wearing, I guess you would call that a brown suit.

Q. How long have you known Nathaniel Harris?

A. I have been knowing him, oh, for five years.

Q. How long have you known Clarence Robinson?

A. About the same amount of time.

Q. How long have you known Gladys Stamps?

A. Known Gladys Stamps about four years.

Q. I will ask you, Mr. Robinson, if you had occasion to see any of these defendants on February 8, 1956?

A. Yes, I did.

Q. Whom?

A. Gladys Stamps and Clarence Robinson.

Q. Where did you see them?

A. In a bedroom at 4567 McMillan.

Q. What time was it?

A. It was approximately 2:00 o'clock in the morning.

Q. How long had you been at 4567 McMillan before you saw them?

A. About three minutes.

Q. Where had you come from, sir?

A. I had come from the Deer Street station, my district.

[fol. 28] Q. How far is it from the Deer Street station to that location?

A. Five blocks.

Q. When you left the Deer Street station, what did you do?

A. I left the Deer Street station, I went to walk my beat, I was headed back toward some of my territory, which covered part of——

Q. Let me ask you this, were you working at that time?

A. Yes, I was working at that time.

Q. You were working as a beat patrolman?

A. That's right.

Q. Is 4567 McMillan, was that on your beat that night?

A. It was part of my territory.

Q. It is your territory. You left the Deer Street station sometime prior to 2:00 o'clock?

A. That's right.

Q. Who was with you, if anyone?

A. My partner at that time, Robert Foxworth.

Q. Did you and Foxworth leave the Deer Street station in company, sir?

A. Yes, we did. We left together.

Q. Where did you go then?

A. We went south on Taylor Avenue, which is part of my territory.

[fol. 29] Q. Then what did you do?

A. We just crossed Page Boulevard, which is approximately three blocks from McMillan, and we were supposed to get some information that night.

Mr. Lynch: I object to the statement just made and ask that the witness be instructed to answer only the questions asked and the jury be instructed to disregard it and a mistrial be declared.

The Court: Be overruled. Let's proceed. He hasn't stated what anybody said to him.

By Mr. Tucker:

Q. You said you crossed Page Boulevard?

A. Page Boulevard.

Q. Did you have a meeting there, sir?

A. Yes, we did.

Mr. Lynch: I object to these questions on the part of the defendant Clarence Robinson as being immaterial and irrelevant.

Mr. Wilson: I'm going to further object on behalf of Harris and Stamps on the grounds it is leading the witness. This man has testified he is an officer five years, probably had experience before testifying as a witness. I don't think he has to have any leading.

The Court: Be overruled, but I don't want you to get into any conversations. You may proceed.

By Mr. Tucker:

Q. You were at Taylor and Page, is that right, sir?

[fol. 30] A. Approximately five hundred feet from Page, south of Page.

Q. All right, sir. Where did you go from there, sir?
A. From there I went to 4567 McMillan.
Q. Foxworth with you?
A. Foxworth was with me.
Q. How did you approach 4567 McMillan?
A. We approached 4567 McMillan from the alley, which is between McMillan and Lewis Place.
Q. Was the building lighted?
A. Only one light was on at the time.
Q. Where was that light, sir?
A. That light was in a room near the rear, which we found later to be the third one from the front.
Q. In the premises, 4567 McMillan?
A. 4567 McMillan on the first floor.
Q. You came in through the alley?
A. That's right.
Q. Where did you go then, sir?
A. We went to this lighted window.
Q. Where is the window?
A. The window is located on the east side of the building on the first floor. I think it's two windows in front of it going south.
[fol. 31] Q. Is there another——
A. In front of the building.
Q. Is there another building on the other side?
A. There's another building adjacent to it.
Q. You were in a gangway or passageway, is that right?
A. A gangway.
Q. When you got to the window, what happened?
A. We got to the window, there was a can and a grating. I stood on the can at this lighted window.
Q. You were standing on the can at the lighted window?
A. That's right.
Q. Could you look in through the window?
A. Yes, I could.
Q. What were you looking through? Was the window wide open?
A. No, the window was not wide open. The windows were closed. The shades were drawn. There was about, I guess, eight inches of paper across the bottom of the window, and there was an opening about an inch and a half between the shade and the paper.

Q. There was a gap. Just plain window glass, is that right?

A. That's right.

Q. Nothing obstructing it?

A. Nothing obstructing it.

[fol. 32] Q. When you looked through this window, what did you see, sir?

A. See two people and into the room.

Q. Did you recognize the two people, sir?

A. Yes, I did.

Q. Who were they?

A. Gladys Stamps and Clarence Robinson.

Q. That is two of the defendants in this case?

A. That is right.

Q. Stamps and Robinson?

A. That's right.

Q. Where was the defendant Stamps?

A. Gladys Stamps was standing alongside of Robinson. Robinson was seated at the bed.

Q. He was seated alongside of a bed?

A. Alongside of a bed.

Q. Who was closer to you, Robinson or Stamps?

A. Robinson was closer to me.

Q. How far away were you from Robinson?

A. Approximately as far as from here to the jury box.

Q. Did the window—the jury box, sir?

A. Right here (indicating).

Q. That is the jury box over there.

A. About as far from where I am sitting to this rail (indicating).

[fol. 33] Q. If the window were open, could you have touched Robinson?

A. Yes, I could.

Mr. Wilson: I'm going to object to that, if the court please.

The Court: Be sustained.

Mr. Lynch: Your honor, insofar as the answer may be given, may we ask that that answer be stricken?

The Court: Answer will be stricken. The jury will disregard it.

By Mr. Tucker:

Q. You testified Robinson was seated alongside a bed, and the defendant Stamps was standing alongside of him, is that right?

A. That's right.

Q. What else did you see, sir?

A. I could see a mirror on the bed, part of a mirror on the bed. I could see a dresser against the door and I could see some paraphernalia on this mirror on the bed, plus some powder.

Q. Where was the powder?

A. On the mirror.

Q. Powder was on the mirror?

A. That's right.

Q. Officer Robinson, how long did you look through that window to the best of your recollection?

[fol. 34] A. Oh, I would say approximately a minute, a good minute. Not more.

Q. After you had looked through there, what did you do then, sir?

A. After I looked through there, I got down off of my standing—the can that I was standing on, and proceeded to the front of the house.

Q. When you were standing on that can looking through there, where was Foxworth?

A. Foxworth was standing on a grating next to me at the other window of the room. There is two windows in the room.

Q. When you got down, what happened to Foxworth?

A. Foxworth followed me to the front of the house.

Q. You were both outside?

A. We were both outside.

Q. When you got out in front, what did you do?

A. I got out in front and proceeded up the steps to the front door of 4567, which is a hallway opening onto rooms to my right as I walk in the door.

Q. What was the condition of the doorway?

A. The door was open.

Q. You went inside?

A. I went inside, went inside and proceeded to the rear where——

Q. Just a minute. What is there? Is there a hallway [fol. 35] there?

A. There is a hallway that leads all the way back to what appeared to be a kitchen.

Q. All right, sir. You walked down the hall?

A. We walked down the hall to where we saw just a dim light coming from the crack of the door.

Q. All right, sir. When you got down to the vicinity of that door, what happened?

A. When we got down to the vicinity of where the door was with the light, when we got down to the vicinity of the door where the light was, we went to listen to see if that was the correct door that we had saw the people in, of the room that we had saw the people in, by being the only light, we proceeded down. As we got to the door we hit a loose board.

Mr. Wilson: We didn't hear the last word.

The Witness: We hit a loose board.

By Mr. Tucker:

Q. Somebody stepped on a loose board, you or Foxworth?

A. I don't know whether it was myself or Foxworth, all I know it was a loose board and we gave out a sound.

Q. All right, what happened?

A. My partner stepped on one side of the door and I stayed on the farthest side of the door, at which time someone called out and said, "Who's out there?"

Q. A man or woman?

[fol. 36] A. Woman. We didn't say anything. We heard another call, "Who's there?" Still the same woman's voice, at which time we heard a noise inside as if somebody had begun to move around, and at that time my partner said, "Police officers", at which time we heard a lot more noise and I left from the door and ran outside because I figured that whoever was in there——

Mr. Wilson: I object to anything he figured.

The Court: Be sustained.

By Mr. Tucker:

Q. Just tell what you did.

A. I went out front.

Q. You retraced your steps?

A. I retraced my steps back out the door, down the front steps into the gangway.

Q. Then what happened?

A. When I got in the gangway, there was nobody there. The open window, when I got to the window that was open out of the room, my partner was in the room and said that the people that we had seen in there were gone.

Q. Foxworth was in the room?

A. He was in the room.

Q. What did you do then, sir?

A. I went back around, retraced my steps back into the house, and into the room where my partner was at that time.

Q. You went in the room with Foxworth?

A. I went in the room with Foxworth.

[fol. 37] Q. Then what did you do?

A. We seized some white powder off of the mirror, some filled capsules, a box of gelatin capsules, and also from the room we got some eyedroppers with needles attached.

Q. Mr. Robinson, from what has been marked for identification as Government's Exhibit 1, I show you a piece of transparent paper, together with a paper bag, and ask you if you have ever seen that before, sir?

Mr. Lynch: I'm going to object to that. I'm going to object to the leading form of the question. I'm going to object to any answer that may be given if he has seen it before unless some substantiating basis is made for his testimony.

The Court: Be overruled.

A. Yes, I have.

By Mr. Tucker:

Q. What is that, sir?

A. This is a type piece of paper that was found in the room after the people had left.

The Court: I will sustain the objection. Be stricken unless you can connect it up more than that.

By Mr. Tucker:

Q. I will ask you if you have seen that before?

A. Yes, I have, in the room, after the people had gone, on the bed, on the mirror.

Q. Now, did you put your identification on that at that [fol. 38] time, sir?

A. Yes, sir, I did.

Q. Does that exhibit bear your identification?

A. It does, bears my initials and the date.

Q. You put that on there?

A. I put them on there.

Q. Is that your testimony that that is part of the material that you seized in the room at that time, sir?

A. That is part of the material.

Q. I will show you just for identification, what I will call a green box out of Government's Exhibit 1, and ask you if you have ever seen that before, sir?

A. I have seen this type of box before.

Q. Have you ever seen that box?

A. This box?

Q. Yes, sir.

A. This is not the box.

Mr. Lynch: Your Honor, would you let the record show the witness said, "This is not the box"?

The Court: Don't volunteer.

It may so show.

By Mr. Tucker:

Q. Let me ask you, I'm taking a piece of paper from the green box, and ask you if you have ever seen that before?

A. Yes, I have.

[fol. 39] Q. What is that?

A. This is a piece of paper that we wrapped the capsules in.

Q. Where did you get that paper?

A. This paper was taken from the room off the bed.

Q. And the capsules that you wrapped in there, where did you get those from?

A. I got them off the mirror.

Mr. Lynch: I object to this line of testimony unless the witness is more specific as to the identification of the article he is testifying to, and there is no basis for his testimony.

The Court: Be overruled. You gentlemen will have your time to cross-examine.

By Mr. Tucker:

Q. Is it your testimony, sir, that this piece of paper was a piece of paper that you found in the room?

A. That is correct.

Q. On McMillan Avenue, shortly after 2:00 o'clock in the morning of February 8th?

A. That is correct.

Q. And in that paper you put capsules that you found on a mirror on the bed in the room?

A. That is right.

Q. Does this piece of paper bear your identification?

A. It bears my initials and the date.

[fol. 40] (An article, handed to the reporter, was marked for identification as "Plaintiff's Exhibit 3, 4/16/56, OP.")

By Mr. Tucker:

Q. Officer Robinson, I have a paper bag marked Government's Exhibit 3, which I take is what appears to be a flour sifter and ask if you have seen that before, sir?

A. Yes.

Q. Where and when, sir?

A. It was taken off the bed in the room on the same date.

Q. McMillan Avenue?

A. McMillan Avenue, 4567.

Q. What time?

A. Approximately 2:00 o'clock in the morning.

Q. From a bag that you have marked for identification as Government's Exhibit 3, I have a green box marked "empty gelatin capsules", and ask if you have seen that before?

A. Yes, I have.

Q. Where and when, sir?
A. 4567 McMillan.
Q. What time?
A. Approximately 2:00 o'clock in the morning.
Q. On February 8th?
A. February 8th.
Q. I ask you to open the box, sir. (Witness opens box.) What does that contain?
[fol. 41] A. It contains empty gelatin capsules.
Q. The empty gelatin capsules that are in the box, were they in the box at that time, sir?
A. Yes, the box had empty gelatin capsules in it plus some on the bed.
Q. I am taking from a bag marked Government's Exhibit 3 a yellow handkerchief containing——

Mr. Wilson: I am objecting to Mr. Tucker informing the witness what it is. Let the witness identify the exhibit.

The Court: Be overruled. There shouldn't be too much argument about a handkerchief. I think anybody knows what they are. You had better ask him about it, though.

By Mr. Tucker:

Q. I hand you a paper bag and ask you if you have seen that before?
A. Yes, I have.
Q. Where, when, and what occasion?
A. On the same date, 4567 McMillan, taken off the bed.
Q. I hand you the rest of this yellow handkerchief and ask you if you have seen these other contents?
A. The tissue paper is a paper I marked and put two eyedroppers with needles and Epsom Salts in inside this handkerchief.
Q. This is all at the McMillan address on——
A. At the McMillan address on the bed.
Q. These eyedroppers and needles you found there, sir?
[fol. 42] A. That's right.
Q. You wrapped them in this tissue paper?
A. In that tissue paper.
Q. You have looked at the items in that Government's Exhibit 3, sir. Do they all bear your marks of identification?

A. They all bear my mark of identification.

Q. Where and when did you put those marks on?

A. I put those marks of identification on in the report room at the Deer Street station.

Q. When was that, sir?

A. As we was assimilating the evidence that we had these.

Q. That same morning?

A. That same morning.

Q. Now, sir, when you were back in the room and you had seized this paraphernalia you have identified, what did you do with it, sir?

A. I took the capsules and wrapped them in a piece of paper, a white piece of paper, took them with me to the call box, leaving my partner back in the room, went to the call box and called for help from the call box, which I think is 43, located at Fairfax and Taylor Avenue, approximately a block from where I was, and called for help, and was met by the scout car at that box.

Q. What did you do then, sir?

A. Proceeded back to the address.

[fol. 43] Q. You had the filled capsules with you all that time, sir?

A. I had the filled capsules with me all the time.

Q. When you got back to the McMillan Avenue address, what did you do there, sir?

A. When I got back to the McMillan address, we went in and picked up the rest of the assembled evidence, into the room, which my partner Foxworth had assembled on the bed, took the evidence, got in the scout car, and took it to the station.

Q. Deer Street station?

A. Deer Street station.

Q. About what time did you get over there?

A. I would say approximately five minutes later.

Q. When you got over to the Deer Street station, what did you do with the evidence?

A. The evidence was marked and tagged, put in an evidence bag, and placed in the safe in the captain's office.

Q. You put it in the safe, sir?

A. I put it in the safe.

Q. Did you get it out of the safe, sir?

A. I got it out of the safe the next morning, approximately 10:00 o'clock, or thereabout.

Q. The next morning or the same morning?

A. The same morning. It was the same morning. It was [fol. 44] on the 8th.

Q. What did you do with it then, sir?

A. I got the evidence out of the safe and turned the evidence over to Agent Theisen and Agent Witt.

Q. All right, sir, Officer Robinson, I also show you what has been marked for identification as Government's Exhibit 2 and ask you if you have seen the contents of that envelope before?

A. Yes, sir, I have.

Q. Where and when, sir?

A. That same morning.

Q. What does that contain, sir?

A. This contains powder—capsules of heroin that was taken——

Mr. Lynch: I object to that as being a conclusion on the part of this witness, one which calls for technical——

The Court: Be sustained insofar as the heroin is concerned, unless you personally know.

A. Yes, sir, it contains capsules taken from a coat that was located in that room.

By Mr. Tucker:

Q. All right, sir. When you went to the McMillan Avenue address, did you have this exhibit in your custody?

A. No, I didn't have that exhibit there.

Q. When you got over to the station did you receive it?

[fol. 45] A. I received it.

Q. From whom?

A. I received it from my partner, Foxworth.

Q. What did you do with the contents of this Exhibit 2, sir?

A. I placed it in the paper, tagged it, initialed it, and the date, placed it in the evidence bag.

Q. Did you put it in the safe, sir?

A. Put it in the safe.

Q. When did it come out of the safe?

A. It came out of the safe the next morning—the same morning rather. It was later that morning.

Q. What did you do with this, then?

A. Turned it over to Agents Theisen and Witt.

Q. Along with the other exhibits?

A. That's right.

Q. I will ask you, sir, if you had occasion to see the defendant Gladys Stamps after the morning of February 8th?

A. Yes, I did.

Q. Where and when did you see her, sir?

A. In the 4400 block of Washington Boulevard.

Q. On what date, sir?

A. I don't know the exact address. It's across the street from the Heritage Hotel in the 4400 block.

Q. When was that, sir?

[fol. 46] A. I think it was the 14th.

Q. What happened on that occasion?

A. I arrested Gladys Stamps, brought her to the station, Deer Street station.

Q. You arrested her on the street?

A. On the street.

Mr. Tucker: You may cross-examine.

Cross examination.

By Mr. Lynch:

Q. Officer Robinson, I believe you stated you had been on the force about five and a half years?

A. That's correct.

Q. Would you explain to the court and jury how much time you have spent with the narcotic investigation since being on the force?

A. First time I was in the school we had a narcotic detail, and I was one of the ones selected to go on this detail, which was for three days.

Q. Would you explain to the court and jury how much time you have had since that time with the narcotic squad?

A. No time with the narcotic squad.

Q. Is this your first arrest on the narcotic law?

A. Yes, it is.

Q. I believe you stated that Officer Foxworth was with you at the time you were supposedly looking in the window [fol. 47] on McMillan Avenue?

A. That's right.

Q. I believe you stated you were standing on a can?

A. That's correct.

Q. How tall was this can, sir?

A. I would say about a 40-gallon garbage pail, can.

Q. How tall would you say it was?

A. It would stand about two feet.

Q. You were standing on the can?

A. A little over.

Q. You were standing on top of the can, is that right?

A. That's right.

Q. What was Officer Foxworth standing on at the same time, sir?

A. It was a grating.

Q. Grating?

A. That's right, from the window, from the basement window, there is a row of bars across the basement window you can stick your feet in and stand on.

Q. He was at a different window from the one you were?

A. He was at a different window.

Q. How tall are you, Officer?

A. Five feet nine and a half.

Q. Now, how far was Officer Foxworth from you as you and he were looking in these windows?

[fol. 48] A. A good yard.

Q. In other words, you had a view of the room, is that right, from where you were looking?

A. I didn't have a full view of the room, no.

Q. Would you say how much of the room you could see?

A. I could see into the room at an angle, which I couldn't see across the bed on the other side.

Q. Were you able to see all of the side of the bed that you were looking at?

A. The side of the bed that I was looking at, I could see.

Q. I believe you have stated that one of the defendants was standing beside the bed, is that right?

A. That's right.

Q. Which one was that?

A. That was Gladys Stamps.

Q. I believe you stated that, according to your testimony previously, that the other defendant was seated on the bed, is that right?

A. No, he wasn't seated on the bed. He was seated in a chair beside the bed.

Q. Now, when you proceeded to go around to the front to enter this particular building, did you go with Officer Foxworth?

A. Officer Foxworth and I proceeded together.

[fol. 49] Q. Now, who went in the hallway first, would you say?

A. I went in the hallway first.

Q. As you approached this door in the back, I believe you stated you sort of stepped on a board, one of them, is that right?

A. We were both side by side when we got into the hallway.

Q. Did you notice whether there were any other doors besides the one that you were approaching to this room?

A. We noticed one door as we entered the hall which set at an angle. We passed another door and then the door that showed the light.

Q. Now, after getting into the room and looking around, how many doors did you determine were in the room?

A. After getting into the hall?

Q. After you finally entered the room itself, how many doors were there to this room?

A. To that room there were two doors.

Q. Where did the other door lead to or from?

A. Well, we didn't ascertain—the door didn't open. The door was nailed up that led out the front of the room as we approached inside.

Q. When you got inside, sir, were there any windows open?

A. One window was open.

Q. How high was it open?

A. It was open all the way.

[fol. 50] Q. What about the window you were looking through, was it open?

A. That was the window I was looking through. It was open.

Q. Did you attempt to raise it when you were outside yourself?

A. No, I did not.

Q. I believe you stated also there was about an inch and a half of space there you could look through, is that right?

A. That's right.

Q. When you say "an inch and a half of space", do you mean the horizontal? Give the court and jury some idea of that.

A. The shade comes down, across between the paper and the shade there is about an inch and a half of open clear space.

Q. When you say "an inch and a half", you mean up and down?

A. Up and down.

Q. How much space would there be laterally that you could see?

A. The width of a window, of an ordinary house window, which would be about a yard and a few inches.

Q. Did you move up and down the space of this window to look and see who was in the room or did you just look through one——

A. There was a curtain on each side of the space, which [fol. 51] leaves an opening in the window about that large (indicating), and you could see in it.

Q. When you say "that large", you refer to the space you have indicated of about maybe a foot and a half?

A. That's right, it's about a foot between the curtains.

Q. So you were saying this space was about an inch and a half upward and down and maybe a foot laterally?

A. That's right.

Q. How large was this room, did you determine, after getting into it, sir?

A. We determined the room was about nine by twelve.

Q. Did you have a view of half of it, one-fourth of it or one-tenth of it?

A. I would say I had a good clear view of one half of it.

Q. When you say "half", you mean half in which direction?

A. Half looking straightforward from the window.

Q. As to the location of this room, I believe when you were in the window you were at what you called the east side of the building, is that right?

A. That is right.

Q. And this building is one which faces north and south?

A. It faces north and south.

Q. And 4567 is a building which is on the north side of the street, is that right?

A. On the north side of the street, that is correct.

[fol. 52] Q. And McMillan is a street that runs east and west?

A. East and west.

Q. And the block you were in is the block just west of Taylor, is that correct?

A. Just west of Taylor.

Q. You were looking westwardly at this time, is that correct?

A. I was looking west.

Q. When you say you had a good view of half of the room, do you mean you had a good view of half of it from south to north, or what do you mean?

A. From south to north.

Q. How much of the bed did you see from south to north?

A. I could see on an angle from the bed, from the side I was on, to the foot, but not toward the head of the bed, I couldn't see from over half toward the head.

Q. This bed was facing which direction, lying in which direction?

A. The head of the bed was to the east, and the foot to the west.

Q. In other words, you were looking over the foot of the bed, is that right?

A. No, I was looking from the head of the bed.

Q. Now, you said the head of the bed was eastward, is that right?

[fol. 53] A. That's right.

Q. That is the portion of the bed closest to you, is that right?

A. That's right.

Q. In other words, you had a straight line from the head of the bed to the foot of the bed, a view?

A. A straight line from the head of the bed on an angle to the foot of the bed.

Q. I see. Now, in other words, you were looking straight down the bed, head to foot?

A. No, not straight down the bed from head to foot. I was looking on an angle of the bed from head to foot.

Q. Now, which side of the bed did you miss? Were you missing the north side of the bed or were you missing the south side of the bed?

A. I was missing the upper south side of the bed.

Q. The upper south?

A. That's right.

Q. What do you mean by "upper south"?

A. A little more than half of the south of the bed I could not see.

Q. Now, where was this defendant, Gladys Stamps, standing in relation to the bed?

A. She was standing on the north side of the bed alongside of Robinson.

[fol. 54] Q. I believe you have stated in your direct examination there was some material lying on the bed, is that right?

A. There was a mirror lying on the bed.

Q. Now, would you describe the height of the head of this bed and the height of the foot of the bed, sir?

A. Well, I would call——

Mr. Tucker: I'm going to object to that as completely immaterial, going into a lot of testimony about what he could see on the bed. He has testified very explicitly what he could see. I don't see where the height of the head of the bed or the height of the foot of the bed has anything to do with it.

The Court: Be overruled.

A. The height of the bed is—it's an old type of bed which has a high back to it. It sets into the window, I

would say, about a half a foot, about six inches into the window. The back of the bed shows into the window about half a foot. You can only see so far across the bed from where I was standing on the can, and I can just see the bed from an angle beside the back of the bed, and the two people sitting and standing beside the bed.

By Mr. Lynch:

Q. Now, just one question further along those lines: How high would you say it was from the bottom of the bed to the top of the head of this bed, how high off the floor?

A. You mean the back of the bed or——

[fol. 55] Q. The part that was nearest to you?

A. (Continuing) —or just plain bed?

Q. The part nearest to you.

A. The back of the bed?

Q. Yes.

A. I would say—well, the window sets here (indicating), I can only demonstrate. I couldn't put it——

Q. That's all right.

A. The window sets here, the bed showed about that much above the window sill (indicating), which is about a foot.

Q. Did you examine all of what was Government's Exhibit 1?

A. Yes, I did.

Q. What about the green box a minute ago which you said you hadn't seen before?

A. That was not the box I had seen before, the first green box.

Q. Did you notice any initial on this particular box?

A. No, I didn't.

Q. You didn't put anything in that box, did you?

A. No, I didn't.

Q. Did you initial any of the other boxes?

A. I did initial a green box.

Q. You initialed the one that appeared in the other exhibit, is that right?

A. That's right.

[fol. 56] Q. When did you initial the box that is listed in Exhibit 3, sir?

A. The box was initialed the same morning as the rest of the evidence, on the 8th.

Q. Was that at the scene, 4567 McMillan?

A. No, that was initialed at the station.

Q. That was some two or three hours——

A. No, it was initialed immediately after the evidence was brought in and assimilated on the table.

Q. At the station?

A. At the station.

Q. How long after you had entered the premises of 4500 McMillan were these boxes initialed?

A. Approximately five minutes' time.

Q. I believe you stated that Officer Foxworth was about how far from you, looking through the window?

A. About a yard.

Q. About a yard?

A. The windows are about a yard apart.

Q. I see. Now, this bed, I believe you mentioned this bed was pretty close to you, the end of this bed was fairly close to you?

A. The head of the bed.

Q. Now, how close would you say it was to you, the head of the bed?

[fol. 57] A. Well, if I was to reach in the window, I could just reach in and touch the bed.

Q. Would you say that these defendants, Gladys Stamps and Robinson, were in the middle of the bed, the foot of the bed, or the head of the bed?

A. They were at the head of the bed.

Q. Seated in a chair, weren't they?

A. Robinson was seated in a chair.

Q. Officer, as a matter of fact, when you first made this arrest, you made your report in this matter, didn't you tell your superiors at the Tenth District that you couldn't identify anybody that was in that room, did you not?

A. No, I did not.

Q. Didn't you tell your superiors at the Tenth District upon the making of this arrest that you didn't see anything in this room at that time?

A. No, I didn't.

Q. Didn't you also state in your police report and in other places where you made reports in this matter, that you saw at least four persons in the room?

A. No, I didn't.

Q. What kind of clothes did Robinson have on, sir?

A. He had on the same thing he's got on now.

Q. Did you bring this dresser mirror into court, or is it part of the——

[fol. 58] A. It is part of the evidence in the Police Department.

Q. You saw Robinson there, he was just sitting there, is that right?

A. No, Robinson was busy over the mirror.

Q. I believe you stated you looked in this mirror for about a minute? I'm sorry, through this opening for about a minute?

A. For about a minute.

Q. You had a view, you said, of half of the room?

A. Yes, I would say a half of the room.

Q. When you later saw what is called Government's Exhibit 1 at the station, do you remember yourself putting anything in that box? I believe you stated already you didn't, is that right?

A. Which box?

Q. Exhibit No. 1. Do you remember placing anything in this box?

A. I didn't place it in the box. It was placed in an evidence bag.

Q. It wasn't raining that night, was it, Officer?

A. That night, quite a ways back. I wouldn't say exactly whether it was raining that night. I couldn't testify to that.

Q. Did you place this flour sifter in evidence or did Officer Foxworth obtain it?

A. Place it in evidence?

Q. Did you procure it at the scene or did Officer Foxworth?

[fol. 59] A. He placed it in the paper and turned it over to me.

Q. You don't know anything about what happened to these articles after they were at Tenth District, do you, Officer?

A. I turned them over to Agents Theisen and Witt at the Tenth District.

Q. Which specifically did you turn over to Agent Theisen?

A. All the evidence we had assembled.

Q. That is 1 and 3, and including the sifter, and the green box and all, is that right?

A. That's right.

Q. That was the next morning, is that true?

A. That was the same morning, later that morning.

Q. The same morning.

That is all at this time, your Honor. I would like to have this witness reserved for further cross-examination if necessary.

Mr. Wilson: Officer Robinson, I have two or three questions I would like to ask you.

By Mr. Wilson:

Q. You have already testified that the bed to which you referred, that was in this room, had the head of it facing east, is that right?

A. The head of it was toward the east.

Q. Was toward the east. Where, in relation to the window at which you were standing, was the window at which [fol. 60] Officer Foxworth was standing?

A. Where was it in relation——

Q. To the window.

A. It was south of me.

Q. It was south of you?

A. That's right.

Q. I believe you said you could observe one half of the room which was the north half of the room, is that right?

A. That's right.

Q. What portion of the bed, remembering that the head is faced against the east, what portion of that bed could you see, the north half of it or the south half of it?

Mr. Tucker: I object to that on the ground it is repetitious.

The Court: Be overruled.
The Witness: Would you repeat that question?

By Mr. Wilson:

Q. In view of the fact, taking into consideration the fact that the head of the bed was to the east, you reached in the window and touched the head of it, you said, and you said you could see one half of that bed?

A. From an angle.

Q. Which half could you see, the north half of the bed or the south half of the bed?

A. It would be at an angle. The bed, I would say, is a six-foot bed. From the—let's see, from the northeast cor- [fol. 61] ner of the bed to the southwest corner, I could get a clear view.

Q. In other words, the south corner of the bed, head of the bed, you could not see?

A. The southeast corner of the bed I could not see.

Q. All right. I believe you stated Robinson was sitting doing something over a mirror. Could you tell what he was doing?

A. He had his hands in a white powder. That was as clear as I could see.

Q. Could you see the defendant Stamps?

A. She was standing up alongside of him.

Q. What was she doing?

A. She was watching him.

Q. Watching. Let me ask you this, Officer: You stated when you got back to the district station with these articles that you marked them and put them in the safe in the captain's office, is that right?

A. That's right.

Q. Do you have the combination to that safe, Officer?

A. No, I do not.

Q. You can't open it, can you?

A. No, I can't.

Q. You have no authority to close it, is that right?

A. The only thing I can do is stand and watch my evidence—I placed it in the safe and I see that the safe is locked.

[fol. 62] Q. I see. Who opened the safe for you, Officer?

A. Lieutenant Albert Bean.

Q. And he locked it for you, is that right?

A. That's right.

Q. When you went back later on that morning to secure these articles that you placed in there, was that safe open at that time?

A. No, that safe wasn't open.

Q. Approximately what time did you go back to get these articles?

A. About 2:00 o'clock in the morning.

Q. About what time in the morning was it when you put them in there?

A. About 2:15.

Q. Now, do you know for a fact, of your own knowledge, Officer, whether or not those articles were removed from that safe between the time that you put them there and the time you went back to get them?

A. They were in the same place that I put them in when I got them out.

Q. I asked you, Officer, whether or not they had been moved?

A. I couldn't testify whether they had or not.

Q. Is there a possibility that they could have been moved?

A. It's possible, but I doubt it.

[fol. 63] Q. Now, Officer, let me ask you this: When you were standing on the can outside the window, and I believe you said the can was about three feet tall——

A. No, I said it was about——

Q. Between two and a half and three feet tall?

A. A good two and a half feet.

Q. And you said you were five feet nine?

A. That's right.

Q. How high was that sill from the ground, would you say?

A. I would say it was a good six and a half feet.

Q. So, when you were standing up on that can, how much below your body was the sill of the window?

A. The sill of the window hit about here (indicating).

Q. Hit you about there?

A. Hit me about here (indicating).

Q. And I believe you also stated——

A. At my waist.

Q. I believe you also stated that the head of that bed was about a foot above the window sill, is that right?

A. That's right.

Q. And you have indicated a place approximately——

A. Approximately, almost.

Q. (Continuing) —midway between your chest and your stomach as to where the sill hit you?

A. That's right.

[fol. 64] Q. That would be approximately two feet distance from the top of your head?

A. I don't understand the question.

Q. From the point that you have indicated on your chest where the sill of the window hit you to the top of your head would be a distance of about two feet, is that right?

A. Be about a foot and a half.

Q. So that you could really see over the top of the head of the bed?

A. No, I couldn't see over the top of the head of the bed.

Q. You say the head of the bed was a foot above the sill?

A. That's right.

Q. And your body was about a foot and a half above the sill?

A. The bed sets off like this (indicating). Here you've a curtain, then you got a space and you got another curtain. You got a space between the two curtains. The bed is over here (indicating). You can see the shadow of the curtains on the bed. I'm looking through a space about a foot into the room, directly at the two defendants.

Q. So you were never really looking across the head of the bed?

A. No, I couldn't look across the head of the bed.

Q. Now, as to these exhibits that have been shown you here, one box of which you marked, I think, as part of [fol. 65] Exhibit 3, you marked with your initials, and you said there were some capsules in it, is that right?

A. That is correct.

Q. Do you know how many capsules were in that box?

A. Empty capsules.

Q. I don't know whether they were empty or full.

A. There were some empty capsules, I didn't count the number of empty capsules.

Q. You didn't mark any of the capsules?

A. No, I didn't mark the capsules.

Q. You marked the box?

A. I marked the box.

Q. So you don't know whether those capsules that were in there were the same ones as when you marked the box?

A. Empty capsules, wasn't anything in them.

Q. I say you don't know whether they were the same?

A. No, the box was the same.

Q. The things that you wrapped in a paper that you said you got out of a garment in the room, you marked that piece of paper?

A. I marked the paper containing it.

Q. You didn't mark those capsules contained in it?

A. No, I didn't.

Q. You don't know whether or not those were the same capsules that were in there when you marked the paper or not, do you?

[fol. 66] A. No, I couldn't say.

Mr. Wilson: I have no further questions.

Mr. Tucker: No questions.

The Court: You may stand aside.

(Witness excused.)

The Court: Call your next witness.

Robert Leland Foxworth, being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Tucker:

Q. Will you state your name, please?

A. Robert Leland Foxworth.

Q. Where do you live, Mr. Foxworth?

A. 1327-A Goodfellow.

Q. You are a member of the St. Louis Metropolitan Police Department, sir?

A. I am.

Q. How long have you been a member of the St. Louis Metropolitan Police Department, sir?

A. Since May 16, 1955.

Q. Not quite a year?

A. Not quite a year.

Q. Are you a graduate of the St. Louis Metropolitan Police Academy, sir?

[fol. 67] A. I am.

Q. When attending the Police Academy, did you have a course in the illegal drug traffic, sir?

A. I did.

Q. Where have you been assigned since graduating from the Police Academy, sir?

A. The Tenth District, referred to as Deer and Easton.

Q. Were you working out there on February 8th of this year, sir?

A. I was, sir.

Q. Where were you about 2:00 o'clock that morning on February 8, 1956?

A. Well, we had just left the station. We were going south on Taylor.

Q. By "we", whom do you mean, sir?

A. Officer Nathaniel Robinson, Jr., and myself.

Q. That is the man who just testified?

A. That's right, sir.

Q. All right, sir. What did you do?

A. We—as I said—were on the east side of Taylor going south to do routine beat duty.

Q. Did you get to Page Avenue, sir?

A. Yes, I had crossed Page.

Q. After you left Page Avenue, where did you go, sir?

A. 4567 McMillan.

[fol. 68] Q. Did you go there in company with Officer Robinson?

A. In company with Officer Robinson, yes, sir.

Q. How did you approach those premises?

A. We went up an alley and then came up a gangway.

Q. Came in from the rear, is that right?

A. From the rear.

Q. Were there any lights on in the building?

A. Yes, there was a light on, I believe, the first window that we approached in the gangway.

Q. That is coming from the rear of the building?

A. Right.

Q. What did you do when you got there, sir?

A. Well, I looked through one of the windows.

Q. How many windows were there in this lighted room, sir?

A. Two.

Q. Which window did you look through, the first one you came to or the second?

A. The second one I came to.

Q. Officer Robinson was looking through the other window?

A. Yes, he got there first so he was looking in that one, and I had to take the next one.

Q. When you looked through that window, sir, how was it physically? What were you looking through?

A. Well, of course, there was what I later learned to be a piece of white paper about this long (indicating), and [fol. 69] about this high (indicating).

Q. Where was that?

A. It was at the bottom of the window.

Q. On the sill, standing up on the sill?

A. Well, I'm not familiar with the geography of the window, but it was from the basement window on up about ten inches. This paper, it sagged somewhat, so it was sort of laying back. There was a, I believe, two curtains at equal distance apart, and there was a shade. The shade had been pulled down so that ordinarily it would have adjoined this top of this paper, but by this paper having sagged back, it could admit about an inch and a half of view space for about, oh, so far.

Q. About six or eight inches?

A. Yes, sir.

Q. Now, when you looked through the window, what did you see, sir?

A. I saw a man looking intently at something that he was holding in his hand, and then he went through a motion

with his right hand, but—and brought it back up to his hand (indicating).

Mr. Wilson: I'm going to ask that that portion of the witness' statement insofar as the man was "looking intently" be stricken.

The Court: As to the "intently" part, that will be stricken, and the jury will disregard it. The rest of it will [fol. 70] remain.

By Mr. Tucker:

Q. He made a motion with his right hand over his left hand, is that right?

A. Yes.

Q. How close were you to that man?

A. Oh, closer than I am to the stenographer here.

Q. Closer than that?

A. Yes.

Q. How much closer?

A. Oh, I would say about—within reaching distance.

Q. Within reaching distance of the man?

A. Yes.

Q. Do you see that man in the court room, sir?

A. I do.

Q. Where is he?

A. He sits there (indicating), with the dark glasses.

Q. What is he wearing?

A. Oh, I don't suppose—that is not brown. Some sort of a brown suit, dark glasses and an off-color shirt.

Q. Did you know the man when you saw him, sir?

A. I had seen him before. I didn't know his name.

Q. Do you know him now, sir?

A. I do.

Q. Who is it?

A. Nathaniel Harris.

[fol. 71] Q. Now, how long would you say you looked through this window?

A. Oh, about a minute and a half, I would say; a minute, or a minute and a half.

Q. What happened then after you looked into the window for the minute or minute and a half, sir?

A. Well, I believe my partner nudged me on the leg and we proceeded to the front of the house.

Q. When you got out in front, what did you do?

A. We went up the steps, went on the little porch-like, and we opened the screen door and this other door was a little ajar, and we proceeded in the hallway.

Q. The front door was open, is that right, sir?

A. Yes, there was a light in the hall.

Q. Where was the light?

A. Up in the ceiling.

Q. Was it burning?

A. Yes.

Q. All right, sir. Then what did you do?

A. We tiptoed down the hallway and after we got to the door, well, we got to the door might be the door from the window that we were looking in, and just as I passed the door and wanted to take a position alongside of it, a female voice called out, "Who's out there?".

Q. What happened then?

[fol. 72] A. Well, I stood as quietly as I possibly could and the voice asked, says, "Who's out there?" And after I heard a slight shuffle on the inside, I decided to let them know who was out there, and I told them, "The police."

Q. After you said, "Police", what happened then?

A. Well, I heard a loud shuffle and then I proceeded to try to get in the door. I tried to open it and it didn't open.

Q. Were you able to get in?

A. Well, yes.

Q. You went into the room, is that right?

A. I did.

Q. Officer Robinson didn't go in with you?

A. No, Officer Robinson, the minute I said, "Police", he started down the hall, back down the hallway and out the front door.

Q. All right, sir. Now, when you got into the room, did you see anybody in there?

A. No, no one was in there.

Q. What did you do after you were in there?

A. Well, I went, after not having seen anyone, there was a door in the southeast corner of the room, I went and tried the door. I ran back out the door, flashed my light in

what appeared to be a kitchen, and satisfying myself that no one was there, I looked in the closet, hallway closet. That [fol. 73] was filled with soiled clothing. I fished around in there, satisfying myself that no one was there, and I went back in the room.

Q. How long did that take?

A. Oh, a minute.

Q. Then after you got back in the room, what did you do then?

A. Oh, I proceeded to pick up the dresser that had been behind the door.

Q. There was a dresser behind the door that you went through?

A. Yes, sir.

Q. After you picked up the dresser, what did you do?

A. I set it upright, and then I noticed that there was clothing on the floor, what you call a pocket jacket, and an off-tone suede jacket, two men's hats, a lady's suit, then I took them up from the floor and laid them on top of the dresser. It was that little mirror to the dresser.

Q. After you put the clothes up there, what did you do?

A. I happened to look over toward the bed and I saw some paraphernalia was still there, and I proceeded to scoop it up, put it in a brown paper, and then I noticed a box with unfilled capsules in one corner of the mirror, razor blade, and I noticed a sifter lying at the head of the bed on two pillows, and I gathered up the paraphernalia and [fol. 74] put it in a container that I had there, a piece of brown paper.

Q. Officer Foxworth, taking from what has been marked as Government's Exhibit 1, I hand you a glassine envelope and a piece of brown paper and ask if you have seen that before?

A. Yes, I have.

Q. Where and when did you see that, sir?

A. On the date and place mentioned.

Q. The 4500 McMillan address?

A. That's right.

Q. February 8th?

A. That's right.

Q. 2:00 o'clock or a little after in the morning?

A. Well, a little later than 2:00 in the morning.
Q. Did you put your initials on this?
A. I did.
Q. That is your identification on there?
A. That is right.
Q. Taking from a green box in Government's Exhibit 1, I show you a piece of paper containing what has been described as capsules of heroin and ask you if you have seen that paper before?

Mr. Lynch: I'm going to object to the form of the question, which has been described as capsules of heroin, and ask that that part of the question be stricken, the jury not to consider the prospective of that question.
[fol. 75] The Court: Be overruled. He's merely identified it as that. We had an expert this morning said that is what it was. I don't know. That is what he swore it was.

A. I have.

By Mr. Tucker:

Q. Where and when did you see that, sir?
A. A little after 2:00, February 8th, at 4567 McMillan.
Q. Does that bear your identification, sir?
A. It does.
Q. Did you assemble or help assemble the capsules in here, sir?
A. The capsules, no. Officer Robinson had that in his possession.
Q. How about the bulk in here, sir?
A. There was some—the bulk that I assembled is in one of the packages. I don't know which one.
Q. Is that the one with your identification on it?
A. Yes, the top.
Q. Officer Foxworth, I show you what has been marked Government's Exhibit 2 for identification and ask you if you have seen the paper in there before, sir?
A. Yes, I have seen it before.
Q. What is that, sir?
A. I don't know what is in here. Oh, those are some capsules that I got out of a lining of a lady's suitcoat.

Q. Where and when, sir?

[fol. 76] A. At the time mentioned and the date, February 8th, at the place at 4567 McMillan.

Q. Officer Foxworth, I will show you a paper bag containing various items and ask if you have seen the items in there? This has been marked for identification as Government's Exhibit 3. Have you seen those items before, sir?

A. That is my signature. This also bears my signature (indicating), as also does this (indicating), and this (indicating). Yes, I have.

Q. Where and when did you see those?

A. February 8th, about 3:00 o'clock, later in the morning, at 4567 McMillan.

Q. This box of empty gelatin capsules, are those the gelatin capsules you found there?

A. This is the box. It bears my signature.

Q. Did you see the two syringes and needles in there?

A. Yes.

Q. Did you find those?

A. I gathered those and turned them over to Officer Robinson.

Q. Where was all this equipment, sir?

A. The two syringes were at the head of the bed or on the mirror, and was just a little bit west of that sifter.

Q. Officer Foxworth, after you had assembled all this material, what did you do with it?

[fol. 77] A. Well, by that time—by the time I had assembled it, Officer Robinson came back into the room accompanied by my sergeant, and I turned it over to him.

Q. You gave it to Officer Robinson?

A. Well, I gave the heroin to Officer Robinson; this other material, I didn't know whether it was necessary, so I handed it to the sergeant. He said, "Yes, get it all. It's all important."

Q. How about Government's Exhibit 2, the five capsules? Did you give that to Robinson?

A. I did.

Q. At that time?

A. No, later on in the morning. I didn't discover them until a little later in the morning.

Q. After the sergeant and Officer Robinson came back in

and you turned the paraphernalia over to Officer Robinson, what did you do then, sir?

A. I remained there as a stake-out in the hopes that somebody else might return.

Mr. Wilson: I object to anything the officer hoped.

The Court: Be sustained as to the "hoped" part. Be stricken, the jury will disregard it.

By Mr. Tucker:

Q. You remained there?

A. I remained there.

Q. Where did you stay, sir?

[fol. 78] A. Well, for a while I stayed inside the room, oh, about five minutes; I got a little nervous, I walked up the hallway.

Mr. Wilson: I object to whether or not the officer got nervous.

The Court: Be overruled.

A. I walked up the hallway to the front door. I peered out and then I thought, well——

Mr. Lynch: I object to what he thought.

The Court: Be sustained.

Just tell what you did.

By Mr. Tucker:

Q. Just tell what you did.

A. I stood at the doorway and then peered out the doorway and a cab was approaching, so I opened the door, looked out, and then I stepped back in. The cab went up the street, under the lights, a lady got out.

Q. How far away was that from the house?

A. Oh, about the distance from here to the rear door.

Q. Then what happened?

A. The lady walked back. She got to this address and she started up the steps. There were two tiers of steps. She got to the top tier and then evidently she saw me standing in the doorway.

Mr. Wilson: I'm going to object to the phraseology of the officer; supposition on his part.

The Court: Be sustained, unless he knows. Be stricken. [fol. 79] The jury will disregard it.

Mr. Lynch: I'm going to further object to this testimony unless it is shown it is material.

The Court: Be overruled.

By Mr. Tucker:

Q. The lady got up to the door, then what?

A. She got up to the door and then she turned suddenly and started back down the steps. I flashed my light on her and restrained her. She came into the room and she told me she had come for—I asked her if she knew who lived here.

Mr. Lynch: I object to any testimony that this woman might have given.

Mr. Tucker: This is one of the parties.

The Court: Be sustained.

Mr. Wilson: No.

The Court: Be sustained. Be stricken. The jury will disregard it. Why don't we get down to what is involved here?

By Mr. Tucker:

Q. Assuming that this lady later left, Officer Foxworth, what did you do then?

A. The car came back. I turned these five capsules——

Mr. Wilson: I object. The witness says the car came back. What car? He hasn't identified the car.

The Witness: The squad car.

By Mr. Tucker:

Q. The police car came back?

[fol. 80] A. Directed by Officer Holloway, my sergeant.

Q. Officer Robinson with him?

A. Yes, and another officer who had come to stay with

me. As a probational patrolman, I'm supposed to be with somebody all the time.

Mr. Wilson: I object to all that as immaterial.

The Court: Be sustained. Be stricken. The jury will disregard it.

By Mr. Tucker:

Q. The officer came back to see you, then what happened?

A. The girl and remaining paraphernalia was turned over to the sergeant and Patrolman Robinson.

Mr. Lynch: I object to any testimony concerning any girl unless it is ascertained it is one of the defendants in this case.

The Court: Be sustained. Be stricken.

By Mr. Tucker:

Q. Assuming that this lady left——

Mr. Wilson: I object to this witness assuming anything. He shouldn't be assuming.

The Court: He didn't assume anything. He just moved it be stricken. You gentlemen make up your mind whether you want it in or out. It hasn't anything to do with it. I just took it out. Do you want it in with respect to your client?

Mr. Wilson: Mr. Tucker was asking his witness a question, assuming so forth and so on.

[fol. 81] The Court: No question about assuming, he's already stated. Let's proceed and get down to this lawsuit.

By Mr. Tucker:

Q. All right, sir, after you and the other officer were there, what happened then?

A. I was told to——

The Court: Let's don't get into what you were told unless it is some of the defendants.

By Mr. Tucker:

Q. What did you do?

A. I remained at this address watching a car that brought this heroin to this address?

Mr. Wilson: I'm going to object.

The Court: Be sustained. Be stricken. The jury will disregard it, unless you know that is true.

Mr. Lynch: I make a motion for a mistrial on that, your Honor.

The Court: Be overruled.

Mr. Tucker, you ought to know something about what this man knows. Let's get down to the part that we are involved with. We are not involved with all of that. I would assume with certain statements made certain things happened. Let's get down to that part of it and ask him about it.

By Mr. Tucker:

Q. Did you see any of the other defendants that night?

A. I did.

Q. Who?

[fol. 82] A. Clarence Robinson.

Q. When?

A. When I placed him under arrest.

Q. Where was that?

A. In front of this address, 4567 McMillan.

Q. What time, sir?

A. About 2:30.

Q. How did the defendant Robinson arrive there?

A. In a cab, in a taxicab.

Q. When he came up in the taxicab, what did he do?

A. The cab came alongside of this car that I was left here to stake-out, to watch, and he got in it and attempted to drive it off.

Q. You stopped him then?

A. I did.

Q. Placed him under arrest?

A. I did.

Q. What time was that?
A. About 2:30.

Mr. Tucker: Cross-examine.
The Court: Announce a ten-minute recess.

(Whereupon, a short recess was taken, pursuant to which the trial proceeded as follows:)

The Court: You may proceed.

[fol. 83] Cross examination.

By Mr. Wilson:

Q. Mr. Foxworth, you are the same Foxworth who fought professionally in light-heavyweight ranks?
A. Yes.
Q. About how many bouts did you engage in when you were fighting?
A. That's right.
Q. That's right?
A. About one hundred fifty, yes.
Q. How many times, if any, were you knocked out?
A. I never was.
Q. Ever have any technical knockouts?
A. Yes.
Q. How many times were you so knocked out?
A. Once.
Q. You formerly used to live in East St. Louis, Illinois, is that correct, sir?
A. That's right.
Q. Prior to your being employed by the St. Louis Police Department as an officer, you made application to the East St. Louis Police Department for employment, didn't you, sir?
A. That's right.
Q. And you were turned down, were you not, sir, because of defective eyesight?
[fol. 84] A. No.
Q. That is not true?
A. No.

Q. How long have you been wearing glasses?

A. Oh, about eight years.

Q. How long has it been since you stopped fighting professionally?

A. About seven.

Q. So that during the last year of your professional prize fighting you were wearing glasses?

A. Off and on.

Q. But not in the ring, naturally?

A. I beg pardon?

Q. Not in the ring?

A. Oh, of course not.

Q. Now, Mr. Foxworth, directing your attention to the night or early morning hours of February 8th, you testified on direct examination that you were looking through the south window in the east wall of the building at 4567 McMillan, is that correct?

A. That's right.

Q. And you have said that the physical conditions of that window were these: The shade was drawn down to the piece of paper that was at the bottom of the window?

A. That's right.

Q. And that if the paper had not sagged to one side you [fol. 85] would not have been able to see through that, is that right?

A. I didn't say that.

Q. What was your statement?

A. I stated that this is the condition that existed at that particular window, that I made no statement as to whether I would have been able to see or not see.

Q. Could you see through the paper, that portion of the paper that had not sagged? Could you see into the room through that portion of the paper?

A. No, I don't think so.

Q. All right, sir. Now, as you looked into the room, I believe you said you could see a space of about a foot wide, is that right, through that opening, between the shade and the paper?

A. Not quite a foot.

Q. A little less than a foot?

A. Yes.

Q. What portion of that room could you see, sir?

A. I didn't look for a portion of the room. I was met by a face and I looked at the face, primarily.

Q. I see. I believe you testified on direct examination that had the window been open you could have reached in there and touched him, is that correct?

A. That's correct.

Q. Who else did you see in that room?

[fol. 86] A. No one.

Q. Did you attempt to look about the room or did you only look at that face?

A. Just looked at that face.

Q. Didn't look to see if there was anyone else in the room?

A. No. I couldn't see anyone else.

Q. I believe you also testified that you and your fellow officer left the Deer Street station about 2:00 a.m.?

A. Approximately.

Q. And proceeded south on Taylor Avenue?

A. Well, yes, you have to come up Deer Street and go down Evans and then proceed south on——

Q. You came south over Deer to Evans Avenue, is that right?

A. That's right.

Q. And proceeded east on Evans to the corner of Taylor?

A. Yes.

Q. Across Taylor to the east side of the street?

A. At Page.

Q. In other words, you came over Taylor Avenue on the west side of the street from Evans to Page, is that right?

A. Yes.

Q. When you got to the corner of Page, you crossed over to the east side?

[fol. 87] A. That's right.

Q. Then you proceeded south, you said, to an alley?

A. We proceeded south to Beckett's Field.

Q. Where is that located?

A. That is located on Taylor about 1100, I believe, 11 or 1200. I don't know exactly.

Q. And from there you went on up this alley and went west up the alley to McMillan, is that correct?

A. That's correct.

Q. And came through this gangway, at which time you proceeded to look through this window?

A. Correct.

Q. And you saw one face there?

A. That's right.

Q. Whom you testified you identified as one Nathaniel Harris?

A. That's right.

Q. And thereafter you went on into this hallway?

A. That's correct.

Q. Now, you also testified, Officer, that after someone yelled out, "Who's there?", and you, upon the second time, said, "Police Officers", that you heard a shuffle in the room and you thereafter went on into the room, is that right?

A. That's right.

Q. You had no search warrant for that room?

[fol. 88] A. No.

Mr. Tucker: Your Honor, I am going to object to this line of testimony at this time. Motions have been filed and all argued.

The Court: Let's don't get into that. The jury is not concerned with that. I will take care of the law. He's already answered. Be overruled.

By Mr. Wilson:

Q. And you testified there was a dresser or some piece of furniture up against that door, is that right?

A. I found it after I gained entrance to the room.

Q. But you had to use force to open that door?

A. I did.

Q. When you got inside, there was no one in the room?

A. No.

Q. And you further testified that you gathered up all this evidence?

A. I gathered up that evidence that was in the room at the time when I got there.

Q. All right, sir. Who else was in the room prior to you aside from these people that you said were in there and must have left? Anyone get in there between that time and the time you got in there?

A. No.

Q. So that the evidence you gathered was what was in the room when you got there, is that right?

[fol. 89] Now, as to the Government's Exhibit No. 1, which you have already viewed, did you gather these two items yourself?

A. I don't know what's in that box. I will have to see.

Q. You may take the band off and see if your initials are on it. Did you gather that piece of evidence yourself?

A. I do not know. It is customary to initial——

Q. Just a minute, I'm going to object to anything that is customary. I'm asking you if this specific piece of evidence, did you gather it yourself?

A. I wouldn't know whether that is the particular material.

Q. You would have no way of knowing if this is the particular material that was in that room that night?

A. No.

Q. How about this portion of Government's Exhibit No. 1? Would you know whether or not that was the material that was found in that room?

A. Yes.

Q. It is?

A. Yes.

Q. Are you referring to the bag or are you referring to this transparent bag?

A. No.

Q. With the contents?

A. No, this——

Q. The brown bag is what you are referring to, right?

[fol. 90] A. That doesn't have my initials on it.

Q. Oh, you would not know anything about this portion of Government's Exhibit No. 1, is that correct, sir?

A. No, that brown bag bears my initials.

Q. What about the white transparent bag that is attached to the brown bag? Do you know anything about that?

A. No, Officer Robinson gathered some of this material.

Q. So you don't know whether this particular item was in that room or not, is that right, sir?

A. No, I couldn't say.

Q. Now, as to Government's Exhibit No. 2, did you gather that bit of evidence out of that room?

A. Yes.

Q. Do you know whether or not the contents contained in this piece of initialed paper is the same as was found in that room that night?

A. I do.

Q. Are your initials on this?

A. No, but this—two of these capsules out of the five have a pinkish look to it.

Q. Did you mark the capsules?

A. No, I didn't mark the capsules, but I can see that this is——

Q. Would you know whether or not these capsules are the same ones as the pink ones you saw that night in the room?

[fol. 91] A. It's impossible to mark the capsules.

Q. I didn't ask you that, but would you know whether or not these are the same capsules that you saw in that room that night?

A. I don't suppose I could know.

Q. Now, as to Government's Exhibit 3, which you have seen, are your initials on that sifter?

A. It is.

Q. Did you gather this piece of evidence yourself, sir?

A. I did.

Q. What about this box?

A. I did.

Q. You gathered these yourself?

A. I did.

Q. Do you know whether or not the contents of this box are the same as what was gathered that night in that room?

A. There was a box almost completely filled with empty capsules.

Mr. Wilson: I will move that answer be stricken as not responsive to the question.

The Court: Be overruled. You can ask him the question.

By Mr. Wilson:

Q. Are the contents in this box as far as you know the same contents as what you found that night?

A. I would have no way of knowing.

Q. I show you this envelope. Did you gather that bit of [fol. 92] evidence that night, sir?

A. I did.

Q. Are your initials on this one?

A. No.

Q. How do you know this is the same one you gathered?

A. I recognize the handwriting.

Q. How about that piece of evidence, sir?

A. That is the material that Officer Robinson gathered.

Q. So you don't know whether it was gathered in that room or not?

A. Yes, I do.

Q. Did you see him gather this here?

A. Yes.

Q. Did you initial this?

A. No.

Q. Did Officer Robinson initial it as far as you know?

A. I don't see an initial on it.

(Counsel indicates to witness.)

Yes, that is his initials.

Q. Did you see him initial this?

A. Yes.

Q. What about this bit of evidence (indicating)?

A. Yes.

Q. Did you gather this or did Officer Robinson gather it?

A. It is just a piece of paper.

[fol. 93] Q. I say, did you gather it or——.

A. I don't know.

Q. What about this handkerchief, sir?

A. I don't recall.

Q. You don't recall this being in that room?

A. I know it was in the room. I don't recall who picked it up.

Q. Do you know whether or not you did?

A. I don't recall.

Q. And what about this box?
A. Officer Robinson picked that up.
Q. Did you see him gather this?
A. Yes.
Q. Did you initial it?
A. No.
Q. Did he initial it?
A. No.
Q. So you don't know whether or not for sure this is the same box or not, is that right?
A. It's in with the rest of the stuff.
Q. I didn't ask you that, Officer. Do you know for a fact that this is the same box that was there that night?
A. No, I didn't have it in my possession all the time.
Q. Now, what about this (indicating)? Did you gather that piece of evidence?
[fol. 94] A. No, Officer Robinson did.
Q. Did you see him gather this?
A. Yes.
Q. You didn't initial it, is that right?
A. No.
Q. How about these two droppers and needles?
A. I gathered that myself.
Q. Did you initial these anywhere?
A. No.
Q. Do you know for a fact that these are the same ones that were in that room that night?
A. Ones that looked like that.
Q. They look like it but you couldn't say for sure that they are the same ones?
A. I recall having seen—definitely having seen that one from the wire, homemade, what we call a homemade job.
Q. Did you mark this with any identifying mark?
A. No.
Q. So you have no way of directly knowing this is the same one that was found in that room, is that right, Officer?
A. Other than by that one mark I told you about.
Q. All right, sir. Now, Officer, when Officer Robinson went outside the premises as you were going into the room, how long was it before he came back, do you know?

A. Well, he came right back, I think, after—yes, he did. [fol. 95] He came right back and said that they had gone.

Q. I see. Then where did he go? Did he leave again?

A. I was looking around in the kitchen.

Q. Did Officer Robinson thereafter leave again?

A. Yes, he went to make a call.

Q. How long was he gone before he came back the next time?

A. Oh, probably fifteen minutes.

Q. What were you doing during those fifteen minutes?

A. I was gathering the paraphernalia together. There was one, as I recall, one package of stuff. He said, "I got the stuff", and said, "I'm going to go and get the car."

Q. That was before he left and was gone fifteen minutes, is that right?

A. This was when he was going to get the car.

Q. I say he made that statement to you before he left and was gone fifteen minutes?

A. That's right.

Q. And I asked you what you were doing during the fifteen minutes he was gone.

A. Arranging the paraphernalia.

Q. So that you gathered it instead of Officer Robinson?

A. I gathered some of it. You see, there was a brown bag with——

Q. I'm just talking about these exhibits we have here.

A. One of those exhibits that you showed me, I don't re- [fol. 96] call which one, had most of the bulk in it and Officer Robinson scooped it up.

Q. When did he scoop it up, before he went and was gone fifteen minutes?

A. Before he went to get the car, and he said, "I got the stuff." Well, while he was gone, I noticed some more lying on the mirror.

Q. You gathered the rest of it?

A. That's right.

Q. When Officer Robinson came back, who was with him?

A. Sergeant Holloway, I don't recall, and some other officer, I don't recall.

Q. Did they enter the premises at 4567 McMillan?

A. They did.

Q. Who then took this evidence?

A. Officer Robinson.

Q. He took it personally?

A. Yes.

Q. Officer Holloway didn't scoop up any of it, did he?

A. Oh, no.

Q. Then what did they do?

A. Well, they left again.

Q. Did Officer Robinson ever come back?

A. Yes.

Q. How soon after he had gone that time did he come back?

[fol. 97] A. He came back with the car when I arrested Clarence.

Q. What time was that?

A. Oh, about, oh, another eight or ten minutes.

Q. So that roughly you entered the premises around ten minutes after 2:00 a.m., is that right?

A. Thereabouts.

Q. And Officer Robinson was gone some fifteen minutes the first time, is that right?

A. About that long.

Q. And he was gone seven or eight minutes the second time, is that right?

A. Approximately.

Q. And it took you some time to peak (sic) through the window and into the premises, did it?

A. You mean—I don't get your question.

Q. From the time you first started looking in the window, it consumed time from the time you walked around and went in the premises, then Officer Robinson walked outside and came back and said, "They're gone", that took some time?

A. Yes, a little.

Q. So when Officer Robinson returned the second time, after he had gone with Sergeant Holloway and some other officers, it would have been then close to 3:00 o'clock?

A. Wasn't quite 3:00.

Q. Now, I believe you testified also, Officer, on direct [fol. 98] examination that part of this evidence that the

government has shown here consisted of some capsules you found later on the premises, is that right?

A. That's right.

Q. And when did you find that, sir?

A. Let's see, while he had gone the second time.

Q. By the time he got back the second time is when you had arrested the defendant Robinson, is that right?

A. Let's see—that's right.

Q. Now, Officer, if you arrested Robinson during the time Officer Robinson was gone the second time, and you stated that you had not seen anyone in that room except someone whom you thought to be Nathaniel Harris, isn't that right?

A. I didn't say whom I thought to be Nathaniel Harris.

Q. Whom you have identified as Nathaniel Harris, is that right?

A. That's right.

Q. That is the only person you saw in that room?

A. That is correct.

Q. You arrested the defendant Robinson, is that right.

A. Yes, sir.

Q. You hadn't seen him in that room, had you?

A. No.

Q. So now when Officer Robinson got back in the meantime you had made this arrest, then what happened?

[fol. 99] A. They took——

Q. Who is "they", now?

A. He and whomever was in charge of the car, the sergeant, they took Robinson to jail.

Q. Who was in charge of the car?

A. Sergeant Holloway.

Q. He came back?

A. Yes.

Q. Was anyone else along with him?

A. I think——

Q. I don't ask you what you think, do you know?

A. Another officer is always, yes, but I don't recall who the officer was.

Q. You didn't see an officer?

A. Yes, I saw one, but I don't recall who it was.

Q. What happened to this other evidence that you had gathered in the meantime? What did you do with that?

A. What other evidence?

Q. These capsules you said you found in a coat.

A. When I arrested him, I turned all the evidence I had then over to the car.

Q. Then when did you place your initials on this evidence, Officer?

A. Let's see. Shortly after, in the morning—shortly after having made his arrest.

[fol. 100] Q. How long did you stay at the premises after Sergeant Holloway and Officer Robinson had taken this man into the station?

A. As long as it takes me to walk from his premises around to the station.

Q. How long was that?

A. Oh, about five to eight minutes.

Q. So that you got to the station at one time, about 3:15 or 3:30?

A. No, no, it wasn't quite 3:00 o'clock; about this time to 3:00, about eight minutes to 3:00.

Q. And that is the minute at which time you placed your initials on these?

A. That's right.

Q. Officer Robinson had had custody of all these items during that time, hadn't he? You had relinquished custody of them to him, had you?

A. Yes.

Q. When you got back to the station and got back to initial them, you had no way of knowing whether they were the same articles or not?

A. Some of those I recognized by sight.

Q. You didn't initial any of them there on the spot, did you?

A. Not on the spot.

[fol. 101] Q. Now, Officer, how many times have you seen Nathaniel Harris prior to the night in question?

A. Prior to the night in question? Oh, any number of times.

Q. Officer, isn't it a fact that the day subsequent to

February 8th I talked to you at the corner of Sarah and Cook Avenue in the City of St. Louis in a tavern, isn't that true?

A. Yes, you talked with me.

Q. And didn't I tell you that Mr. Harris had sent for me to represent him?

A. I believe you did.

Q. And I wanted to know the true story, if it was like you said it was I didn't want to represent him?

A. Yes.

Q. Didn't you at that time tell me that you had never seen Nathaniel Harris before and didn't know him and wouldn't have known him if you saw him again?

A. I told you at that time that the man that I saw was a man whose name I didn't know, but when I did see him again, I recognized him.

Q. Didn't you also tell me, Officer, that thereafter that you were in the Central District Police Station and were looking in a bull pen, or went to the rooms down there and looked around and saw this defendant, Nathaniel Harris, and the only way you knew him was by the glasses he wore and the droop of his mouth, didn't you tell me [fol. 102] that?

A. No.

Mr. Wilson: I have no further questions, Officer.

By Mr. Lynch:

Q. Just several questions, Officer, I wanted to ask. How tall are you, Officer?

A. Six foot.

Q. Now, Officer, how high would you say the lower portion of this window is from the ground outside where you claim that you and the other officer were looking through, the bottom portion of the window?

A. Approximately six feet.

Q. And how high was this object which you were standing on, which purportedly was a grating from the ground?

A. About eighteen inches.

Q. About eighteen inches?

A. Yes.

Q. Was this window on the same ground level with the window that Officer Robinson was looking out of?

A. I don't recall ever having checked to see.

Q. Were they just about the same ground level, would you say?

A. I should imagine they would be.

Q. When you were standing looking through the window, I believe you were then an arm's length of Officer Robinson, [fol. 103] were you not?

A. I don't recall having—in fact, I know I didn't feel out to see if I was within an arm's distance, but I know that the bed sits in a portion of the wall which is about equal distance between the two windows, so I was about, approximately, the length—the width of the bed from him.

Q. How much distance would that be, three feet, four feet?

A. Oh, a bed is about as wide as this space here (indicating).

Q. My question is how far were you from Officer Robinson?

A. About this space here (indicating).

Q. You were on the south end of the building?

A. That's correct.

Q. Now, I didn't get it correct, I want to ask the question here as to the length of opening you had laterally, running sideways, how wide or long would you say it was in that direction, laterally?

A. Which opening are you referring to?

Q. The opening which you were looking through.

A. I told you about six inches.

Q. About six or eight inches, is that right?

A. About six or eight inches.

Q. Now, I believe you stated that you looked into a man's face?

A. That's correct.

[fol. 104] Q. Did you see anything else, a bed or any paraphernalia of any kind which was on the bed, or on the floor?

A. He was—made this one motion, and I could only assume that something was underneath him. I couldn't see the bed, as I found out to be the bed was later. I mean I

later found out it was a bed and it was below the level of the window.

Q. When you say "below the level of the window", what do you mean, the top of the bed?

A. No, I had no reason to see the top of the bed. The top of the bed was abutted against the wall.

Q. You were looking over the top of the bed, is that right?

A. No, I was looking around that portion, I suppose.

Q. I see. Officer, I want to ask you this, too: Who made up the police report in this matter? Was it you or some other officer?

A. Some other officer.

Q. You saw no other person in the room except the one which you have already testified to, is that right?

A. That is true.

Q. You saw no paraphernalia in the room on the floor or anywhere, did you?

A. Not until I got inside.

Q. When you went inside, did you notice the window [fol. 105] being up?

A. Well, the shade was down. I wanted to know how they got out, and after I didn't see anybody, then I went and looked, and I noticed that the window was raised all the way to the top.

Q. What portion of the bed do you say here, now, Officer, that you could see? Could you see half of it or——

A. I wasn't looking for a bed. I was looking for the man and I saw him. I later learned that there was a bed. I wasn't even aware that there was a bed there.

Q. Oh, you didn't even see a bed?

A. I wasn't looking for a bed. I was looking at a face, this man that was handling whatever object he was handling.

Q. Was he standing or seated?

A. He appeared to be seated.

Q. Chair or on the bed?

A. I later found it to be a chair of this type, well, an armchair type.

Mr. Lynch: That is all the questions I have, your Honor.

Mr. Wilson: I have one further question I would like to ask the officer.

The Court: I will let you ask him, but let me state, take them one at a time and do all you want to do at the first go round, because it is bad enough to have two cross-
[fol. 106] examining him without doing it over and over.
You may proceed.

By Mr. Wilson:

Q. Officer, you stated when you went to the window you saw this man's face and you saw him busily engaged, is that right?

A. That's right.

Q. What he was doing you don't know?

A. No.

Q. What he was doing was so unusual that it looked like it was outside the law?

A. We had been told what to expect..

Q. From what you could see, did it look as though he was doing anything outside of the law, committing any crime, from what you could observe?

A. From what I could observe he looked as if he was doing what he was reported to have been doing.

Q. I didn't ask you that, Officer. I asked you from what you could see did the man appear to be doing something outside of the law? Without any prior knowledge on your part, had you looked through that window, would you have said the man was doing something outside of the law?

A. I don't know what something outside of the law would be.

Mr. Wilson: That is fair enough. That is all.

[fol. 107] Redirect examination.

By Mr. Tucker:

Q. Officer Foxworth, before joining the St. Louis Metropolitan Police Department, you took a physical examination?

A. I did.

Q. Did that include an examination of your eyes?

A. It did.

Q. Did you pass that examination?

A. I have.

Q. Testimony has been brought out in cross-examination that you later picked the defendant, Nathaniel Harris, out over at the Central District, sir?

A. That's correct.

Q. When was that, do you remember, sir?

A. Later that day, about, oh, about 2:30 or 3:00 o'clock, maybe a little later.

Q. This is the 8th?

A. The 8th.

Q. When you went down to the Central District, whom did you see down there? Whom did you report to?

A. I don't recall. We went, first, to a show-up room—not a show-up room, but to see some pictures, and I looked at a picture which was given to me as a picture of Nathaniel Harris, and I shook my head. The picture wasn't the man that I had seen.

[fol. 108] Q. All right, sir. Then where did you see the defendant, Nathaniel Harris?

A. In the cell block.

Q. What were the circumstances of that, sir?

A. Well, there were three or four men.

Mr. Wilson: I object to that, your Honor, as immaterial and irrelevant. It doesn't tend to prove or disprove any issue in this case.

Mr. Tucker: You brought it up.

The Court: Be overruled.

A. There were three or four men.

Mr. Wilson: Circumstances under which he saw him are absolutely immaterial.

The Court: Be overruled. You brought it up. They didn't bring it up. They've got a right to ask him about it.

A. The man that took me to the cell block let me wander around and they made a statement that Robinson——.

Mr. Wilson: I'm going to object——

The Court: Be sustained.

Mr. Wilson: (Continuing) —to any statement they made.

By Mr. Tucker:

Q. What did you do?

A. I looked around. There were four or five men in the cell block.

[fol. 109] Q. Colored men or white men?

A. Colored men. And I walked and looked and I walked away and I told this officer that had taken me there that the fellow I was looking for was sitting there in the cell room. So I called to Nathaniel to come to where I could get another look at him.

Q. And he came over?

A. He did.

Q. That is this defendant?

A. That is this defendant.

Q. Now, going back to the morning of the 8th, sir, are your initials on this brown paper?

A. That's correct.

Q. Was there white powder in there when you initialed that, sir?

A. There was.

Q. That is the white powder that was accumulated over in the residence on McMillan, is that correct?

A. That's correct.

Q. When you put your initials on here, sir, were there capsules in there, sir?

A. There were.

Q. They were capsules that you and Officer Robinson had gathered up over there?

A. That is correct.

[fol. 110] Mr. Tucker: That is all.

The Court: Any further questions?

Mr. Wilson: No further questions.

Mr. Lynch: I have one further question to ask.

Recross examination.

By Mr. Lynch:

Q. Are you just as sure of your testimony you gave concerning the person you saw in this room, are you as sure of that as anything else you have testified to?

A. Even more so.

Q. Even more so, is that right?

That is all.

The Court: Stand aside.

(Witness excused.)

BERNARD A. THEISEN, JR., being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Tucker:

Q. Will you state your name, please?
A. Bernard A. Theisen, Jr.
Q. Where do you live, Mr. Theisen?
A. St. Louis, Missouri.
Q. How are you employed?
A. I am a Federal Narcotic Agent with the Treasury [fol. 111] Department.
Q. How long have you been a Federal Narcotic Agent?
A. About four and a half years.
Q. You are presently assigned to the St. Louis office?
A. I am.
Q. You were working here in the St. Louis office in February of this year?
A. I was.
Q. Mr. Theisen, I will show you an envelope which has previously been marked for identification as Government's Exhibit 1 and ask if you have ever seen that, sir?
A. Yes, I have.
Q. What is it?
A. It's a locked-sealed-evidence envelope that we use in our bureau to forward evidence to the chemist.
Q. When did you first see that particular envelope?
A. This is an envelope I filled out on the 9th of February in which I placed 169 capsules of heroin, 42 grains of bulk heroin.
Q. All right, sir. Opening the envelope, now, examining first the brown paper envelope in your left hand, what is that, sir?

A. This is a piece of brown kraft paper, part of a bag, in which there were 42 grains of suspected heroin.

Q. Where did you get that particular bag, sir?

[fol. 112] A. I received this on the morning of February 8, 1956, from Officer Robinson.

Q. Where, sir?

A. At the Tenth District Police Station.

Q. About what time, sir?

A. A little after 10:00 o'clock in the morning.

Q. Looking at the green box in there, sir, have you seen that before?

A. Yes, sir, I have.

Q. What is that?

A. This was a box I used to put the capsules in to prevent them from being crushed in the mail.

Q. The package that is in that box, sir, is that a package that you put in there?

A. It's a napkin containing capsules. I used the piece of paper to specify that 169 capsules of heroin were in there.

Q. Where did you get those 169 capsules?

A. From Officer Robinson at the Tenth Street Police Station.

Q. When?

A. On February 8, 1956.

Q. About what time?

A. Shortly after 10:00 o'clock in the morning.

Q. When you had those two packages there, what did [fol. 113] you do with them after you got them from Officer Robinson?

A. I carried them down to the building, weighed the capsules, filled out the evidence envelope, fastened the locked seals on it and mailed it registered mail to the chemist, St. Paul, Minnesota.

Q. Mr. Theisen, I show you what has previously been marked for identification as Government's Exhibit 2 and ask you if you have seen that before?

A. Yes, I have.

Q. What is that, sir?

A. This is another evidence envelope in which I placed five capsules of suspected heroin.

Q. Where did you get those capsules?

A. From Officer Robinson.

Q. Where and when, sir?

A. At the Tenth District Police Station on February 8, 1956.

Q. The same time you got the others?

A. Yes, sir.

Q. After you got the five capsules in there, sir, what did you do with them?

A. I brought those to the office and weighed the capsules, placed them in the envelope, mailed both of them together to the chemist.

Q. Registered mail?

[fol. 114] A. Yes, sir.

Q. Government's Exhibit 3, this bag contains various paraphernalia. Have you seen that before?

A. Yes, I have.

Q. When did you first see that?

A. On the morning of February 8th, at the Tenth District Police Station.

Q. Whom did you get this paraphernalia from?

A. Officer Robinson.

Q. Same time and circumstances as the other exhibits, 1 and 2?

A. Yes, sir.

Q. What have you done with this?

A. I made out a list of the items that were in the bag and it was placed in the vault up in our office in this building.

Q. It's been in your custody since then?

A. Until this morning.

Q. I will ask you, Mr. Theisen, do you know the defendant, Clarence Robinson, in this case?

A. Yes, sir, I do.

Q. Have you had any occasion to talk with the defendant, Clarence Robinson, sir?

A. Yes, sir, I have.

Q. When was that, sir?

[fol. 115] A. On the 11th day of this month.

Q. Where was that?

A. At the City Jail.

Q. What was your purpose in going to the City Jail?

A. He wrote me a letter and told me he wanted to see me.

Q. When you got over to the City Jail, did you see the defendant Robinson?

A. I did.

Q. Did you talk to him, sir?

A. Yes, I did.

Q. Did you talk to him about the matter under trial here, the affair on 4500 McMillan on February 8th?

A. Yes, I did.

Mr. Lynch: I'm going to object to any testimony as to what might have been stated by defendant Robinson at the time unless it is further assured the man was not deprived of his constitutional rights, unless it is free of duress, unless it is being shown that Robinson's attorney was also contacted at this time. I think it's highly inadmissible, in violation of this defendant's constitutional rights.

The Court: Lay your foundation.

By Mr. Tucker:

Q. All right, sir, you say you got a letter to go over to see Robinson, is that right?

A. That's right, yes, I did.

Q. When you got there, what did you say to him?

[fol. 116] A. I asked him what he wanted.

Q. What did he say to you, sir?

A. He said he wanted to get this whole thing straightened out.

Q. Did you promise him anything, sir?

A. No, sir, I did not.

Q. Did you threaten him?

A. No.

Q. Did you ask him if he had a lawyer, sir?

A. I did.

Q. What did he say?

A. He told me he had one but that he didn't want him.

Q. What did you say to him then and what did he say to you?

A. Well, he told me he had been in jail for sixty-one

days, I think it was, at that time, and that the stuff was not his, that it belonged to Nathaniel Harris. He claimed that—he stated that he had been in the room and that Gladys Stamps was in the room at that time. He told me that all three of them had gone out the window and he wanted to get the thing over with.

Mr. Lynch: I'm going to object to the statements concerning what this defendant may have stated unless it is shown further that they are not in violation of this defendant's constitutional rights. I don't think there's been [fol. 117] any qualification as to the right to testify as to what this man has just stated.

The Court: Be overruled.

By Mr. Tucker:

Q. I ask you, Mr. Theisen, do you know the defendant, Gladys Stamps?

A. Yes, sir, I do.

Q. Have you had any occasion to talk to the defendant Gladys Stamps?

A. Yes, sir, I have.

Q. When was that?

A. The same day I talked to Mr. Robinson over in the City Jail.

Q. Had she written you a letter, sir?

A. No, she had not.

Mr. Wilson: I object to the leading form of the question.

The Court: Be overruled.

By Mr. Tucker:

Q. Had she written you a letter?

A. No, sir.

Q. Why did you talk to her, sir?

A. Well, Deputy Marshal Less Davison had called me on the phone and told me that——

Mr. Wilson: I object to anything that the Marshal told this witness.

The Court: Be sustained.

By Mr. Tucker:

Q. When you talked to the defendant Stamps, did you [fol. 118] ask her if she had a lawyer, sir?

Mr. Wilson: Just a minute, I'm going to object to any conversation this witness had with Gladys Stamps unless there is a proper foundation laid for it. It hasn't been shown she sent for him, that she had been informed of her constitutional rights or anything else.

The Court: I will withdraw the other ruling and let you state what Mr. Davison told you. If you want the foundation, we'll get it.

By Mr. Tucker:

Q. What did Mr. Davison say?

A. He told me that Gladys Stamps had sent word with him to call me, that she wanted to talk to me.

Mr. Wilson: I'm going to again object to anything the Marshal told this witness outside of the presence of the defendant Stamps. Nothing but hearsay on his part.

The Court: Be sustained. Be stricken. The jury will disregard it.

You can qualify him with respect to that, I think.

By Mr. Tucker:

Q. All right, sir, when you saw the defendant Stamps over in jail, did you make any promises to her about this case, sir?

Mr. Wilson: Well, again, I'm going to object to any conversation that this witness had with defendant Stamps. This witness was apprised of the fact that Gladys Stamps had a lawyer of record. I was not contacted. He has not [fol. 119] shown that she was apprised of her constitutional rights.

The Court: Let's not get into that, because I sent the jury out this morning, and I showed you that letter, and if there's anything, any question about the other, I will let you read it again, but I'm not going to put up with mis-

representations to the jury whenever you know that they are not so, and I do too.

Mr. Wilson: If the court please, in view of the letter that was written to you, I think that is one thing, but a conversation that this defendant may have had with this witness is entirely irrelevant.

The Court: I'm not talking about that. I'm talking about with reference to the other. All they can do is depend upon what she tells them. Be overruled. Let's proceed.

By Mr. Tucker:

Q. Did you threaten the defendant, Gladys Stamps, or make her any promise about this case?

A. No, I did not.

Q. Did you ask her if she had a lawyer?

A. Yes, I did.

Q. What did she say?

A. She told me that she hadn't seen a lawyer since she was in jail.

Q. Did you talk to her about the matter on February 8th, out on McMillan Avenue sir?

A. I did.

[fol. 120] Q. What did you say to her and what did she say to you, sir?

A. She told me that she wanted to tell the truth about the whole thing and I told her to go ahead. She told me who was in the room, herself, Clarence Robinson and Nathaniel Harris, and that the heroin in the room belonged to Nathaniel Harris, and that she had been in the room to test some of the heroin. She wanted to get the whole thing over with.

Mr. Tucker: Cross examine.

Cross examination.

By Mr. Wilson:

Q. Mr. Theisen, you went over voluntarily and talked to Gladys Stamps and to the defendant Robinson, is that right?

A. I did.

Q. On information that was secured secondhand as to their wanting to see you, is that correct?

A. Well, I got a letter from Mr. Robinson.

Q. I see.

A. Directed to me.

Q. Are you familiar with Mr. Robinson's handwriting?

A. No, but his name is on the letter.

Q. You hadn't talked to Gladys Stamps prior to the time you got over there, is that right?

A. No, sir.

Q. When you got to the City Jail, when you met in the [fol. 121] warden's office downstairs, you gave him the name of the two persons you wanted to see, is that right?

A. That's right.

Q. Wasn't in direct response to any request from Gladys Stamps for you to come and see her?

A. She wanted to see me.

Q. I said it was not in response to any direct request from her to you to come to see her, is that correct?

A. Direct to me, no.

Mr. Wilson: That is all.

By Mr. Lynch:

Q. What was the date of this conversation, Mr. Theisen, that you had with Gladys Stamps and with the defendant Robinson?

A. April 11th, this year.

Q. In other words, about a week ago, is that right, is that last Monday?

A. I don't recall which day it was.

Q. Did you take down any written statement that these persons made to you?

A. Did I take a statement?

Q. Yes.

A. No, sir.

Q. You didn't have them sign any statement or anything, did you?

A. No, sir, I did not.

[fol. 122] Q. You didn't call me about this matter to see if I objected or not, did you, sir?

A. No, sir, I did not.

Q. Talk with the U. S. Attorney about this matter, that you were going to talk to them?

A. Yes, I did.

Mr. Lynch: That is all. No further questions.

The Court: Any more questions?

Mr. Tucker: No, sir.

The Court: Stand aside.

* * * * * * *

[fol. 124] Morning Session, Tuesday, April 17, 1956

Pursuant to adjournment as aforesaid, at 10:00 o'clock a.m. of said Tuesday, April 17, 1956, the court met, present and presiding as before, and the trial continued as follows:

The Court: You gentlemen may proceed.

Defendants' Case

Whereupon, defendants, to sustain the issues in their behalf, offered testimony, oral and documentary, and made admissions as follows, to-wit:

Mr. Wilson: Miss Stamps.

GLADYS STAMPS, being produced, sworn and examined in behalf of the defendants, testified as follows:

Direct examination.

By Mr. Wilson:

Q. Now, Miss Stamps, will you kindly speak loud enough so the last juror there in the box and the reporter can hear you?

A. Yes, sir.

Q. Will you state your name, please?

A. Gladys Stamps.

Q. You are the same Gladys Stamps who is one of the defendants in this case?

A. Yes, I am.

[fol. 125] Q. Directing your attention to the night or early morning hours of February 8th, 1956, where were you at that time about 2:00 a.m.?

A. About 2:00 a.m. I was at 4567 McMillan.

Q. What type of building is that?

A. Well, it is a four-family flat.

Q. 4567 is on the first or second floor?

A. The first floor.

Q. What side of the building is it, the east or the west side?

A. It's on the east side.

Q. Whereabouts in 4567 McMillan were you?

A. The third room from the front.

Q. Third from the front?

A. Yes.

Q. Who was present at that time?

A. Clarence Robinson and Gola Mason.

Q. Nathaniel Harris has been named as one of the defendants in this indictment. Do you know Nathaniel Harris?

A. Well, I know of Nathaniel Harris.

Q. You at one time stated that Nathaniel Harris was there, is that right?

A. That's right.

Q. What has caused you to change your statement?

A. Well, I mean, now, I want to tell the truth about it, [fol. 126] and I mean I told them from the beginning that it was Gola Mason, and they insisted it was Nathaniel Harris, so, I thought maybe they had Nathaniel Harris and Gola Mason mixed up, and when I seen Nathaniel Harris in court, I knew that wasn't the fellow, that was in the wrong.

Q. Let me ask you this, Miss Stamps: I talked with you yesterday, didn't I?

A. Yes, you did.

Q. You saw an individual come to this court room, did you not?

A. Yes, sir.

Q. Who has been present during this proceeding, is that right?

A. Yes.

Q. You indicated to me that that is the person who was present on that evening, is that correct?

A. That's right.

Q. And you are now stating that Gola Mason was the person who was present at 4567 McMillan?

A. That's right.

Q. About 2:00 a.m. that morning?

A. That's right.

Q. And not Nathaniel Harris, is that right?

A. That's right.

Mr. Wilson: I have no further questions.

[fol. 127] Cross examination.

By Mr. Tucker:

Q. Miss Stamps, there is no question you at one time identified the defendant Nathaniel Harris as being the man in the room out at the McMillan address?

A. I didn't understand that question, sir.

Q. You at one time made the statement that Nathaniel Harris was the man in the room out there with you along with Clarence Robinson, isn't that right?

A. That's right.

Q. You made that statement as late as Wednesday of last week, isn't that right?

A. That's right.

Q. You told that to Mr. Theisen in the narcotic's office, this gentleman right here (indicating)?

A. That's right.

Q. And Mr. Costarella was along with him, wasn't he?

A. Yes, he was.

Q. You said that in front of both of them, didn't you?

A. Yes, I did.

Q. Did they tell you anything at that time?

A. They insisted it was Nathaniel Harris.

Q. Will you answer the question: Did they promise you anything?

A. Well, yes.

[fol. 128] Q. What did they promise you?

A. That I would get consideration in court.
Q. Did they threaten you?
A. No.
Q. Who promised you this consideration?
A. This one (indicating).
Q. This gentleman closest to me here (indicating)?
A. Yes.
Q. Mr. Theisen?
A. Yes.
Q. Just what did he say to you?
A. Well, he said that I would get consideration in court is all, and that the judge would talk to me, would send over for me and talk with me.
Q. Mr. Theisen said that the judge would send over for you and talk to you?
A. Yes.
Q. At that time you did tell them that the people in the room with you were Nathaniel Harris and Clarence Robinson?
A. Yes, I did.
Q. You say you talked to Mr. Wilson yesterday, is that right?
A. That's right.
Q. Did you ever talk to Mr. Wilson any other time since February 8th?
[fol. 129] A. Since February 8th?
Q. Yes.
A. Yes, I have.
Q. When was that?
A. I talked with him in the court room here.
Q. Yesterday?
A. No, before that, one other time.
Q. When there were motions heard, is that right?
A. Yes.
Q. Outside of talking to him in the court room, have you ever talked to him?
A. No, I haven't.
Q. Isn't it true, Miss Stamps, that you and Mr. Wilson and Mr. Harris met on about February 9th here in the City of St. Louis?
A. No, it is not.

Q. And discussed this case?
A. No, is (sic) is not.
Q. You say you know of Nathaniel Harris?
A. That's right.
Q. How long have you known of him?
A. Well, before I had ever seen Nathaniel Harris I had heard of him, but I didn't know him, and I still don't know him personally. I know him when I see him.
Q. Have you seen him on the street prior to this arrest?
[fol. 130] A. Yes, I have seen him on the street.
Q. Did you know him as Nathaniel Harris at that time?
A. Well, at first I didn't, no.
Q. When did you learn of him as Nathaniel Harris?
A. One day I saw him and I was with someone else and he said that was Nathaniel Harris.
Q. How long ago was that?
A. Perhaps about four months ago.
Q. About four months ago?
A. Yes.
Q. This man, Gola Mason, how long have you known Gola Mason?
A. Before the arrest, about two weeks.
Q. About two weeks?
A. Yes.
Q. Where did you meet Gola Mason?
A. I met him at the Celebrity Bar at Enright and Walton.
Q. How many times had you seen him in those two weeks prior to the arrest?
A. Oh, perhaps everyday.
Q. You saw him everyday?
A. Yes.
Q. How many times did you see Nathaniel Harris in the two weeks prior to your arrest?
A. I didn't see him.
[fol. 131] Q. Miss Stamps, prior to your arrest—you are a narcotic addict, are you not?
A. I am.
Q. I assume you haven't had any narcotics in the last two months?
A. No, I haven't.

Q. Have you ever been convicted of a felony?
A. I have been convicted of forgery.
Q. Forgery?
A. Yes.
Q. Sentenced to a year at Alderson, weren't you?
A. That's right.

Mr. Tucker: That is all.

By Mr. Lynch:

Q. Miss Stamps, I believe you have stated there were three persons in the room, Mr. Mason, Robinson and yourself, is that right?
A. That's right.
Q. Could you tell this court and jury at what time Mr. Robinson came in with relation to the time that you and anyone else might have come in that room?
A. I came in about fifteen minutes before Robinson came in.
Q. When did the other person come in, Mr. Mason?
A. He was there already.
[fol. 132] Q. Now, as to the paraphernalia which was described by the state and which was put into evidence, was it there when you got there?
A. Yes, it was.
Q. Was it there when Mr. Mason came in?
A. I wouldn't know.
Q. Was it there when Mr. Robinson came in?
A. Yes, it was.
Q. Had Mr. Robinson been in earlier that day at all or was that his first time there?
A. Not as I know of. He hadn't been in.

Mr. Lynch: That is all.
Mr. Wilson: I have one or two other questions I would like to ask Miss Stamps.

Redirect examination.

By Mr. Wilson:

Q. When were you arrested?

A. February 14th.

Q. Who arrested you, do you know?

A. I turned myself in to Officer Richardson and Officer Robinson.

Q. I see. Where were you carried by them when you were arrested?

A. To the Tenth District at Deer Street.

Q. Were you interrogated when you arrived at the Tenth [fol. 133] District?

A. I don't understand.

Q. Were you questioned when you got there?

A. Yes, I was.

Q. Were you asked about the proceedings on the night of February 8th at that time?

A. Yes.

Q. Did you make a statement to those police officers at that time?

A. No, I didn't make no statement.

Q. Mr. Tucker asked you if as late as this past Wednesday you hadn't stated that Nathaniel Harris was in that room that night?

A. That's right.

Q. Had you ever made any statement previous to that as to who was in that room?

A. No.

Q. Did I understand you to say on direct examination that you had stated that Gola Mason was there?

Mr. Tucker: I'm going to object to the leading form of the question.

The Witness: I didn't understand him.

The Court: Be overruled.

By Mr. Wilson:

Q. Did I understand you to say that previous to making the statement on last Wednesday that Nathaniel Harris

[fol. 134] was there, that you had previously stated that Gola Mason was there?

A. That Gola Mason was there, yes.

Q. When was that statement made and to whom did you make that statement?

A. That statement was made the night of the arrest.

Q. Whom did you make the statement to?

A. Officer Foxworth, Officer Robinson and there were four or five more officers.

Q. Where was that statement made?

A. At the Tenth District.

Q. At the Tenth District?

A. Yes, sir.

Q. I believe you also said on cross examination you are a drug addict?

A. Yes.

Q. How long have you been on the use of drugs?

A. Since '49.

Mr. Wilson: All right, thank you. I have no further questions.

The Court: Any more questions?

Mr. Tucker: No, sir.

(Witness excused.)

[fol. 135] GRACE DRAPER, being produced, sworn and examined in behalf of the defendants, testified as follows:

Direct examination.

By Mr. Wilson:

Q. Miss Draper, will you talk loudly enough, please, so the last juror over there can hear you and the court reporter.

Will you state your name, please?

A. Grace Draper.

Q. Where do you reside, Miss Draper?

A. Now I'm living at 5512 Maple.

Q. Directing your attention to the night of February 7th and the early morning hours of February 8th, 1956, where at that time were you living?

A. At 1259 Aubert.

Q. That is here in the City of St. Louis?

A. That's right.

Q. Now, do you know Nathaniel Harris in this case?

A. Yes, I do.

Q. Did you see him any time between the late evening hours of February 7, 1956 and the early morning hours of February 8, 1956?

A. Well, I saw him that night between 11:00 and 11:30.

Q. Where did you see him?

A. At my house.

[fol. 136] Q. What was the occasion for you seeing him?

A. Well, I had just come out of the hospital with my baby.

Q. Yes. Go ahead and relate the story.

A. And he wanted to see the baby because he hadn't saw the baby.

Mr. Tucker: I didn't hear.

Mr. Wilson: She said he wanted to see the baby because he had not seen it.

By Mr. Wilson:

Q. You say he arrived there sometime between 11:00 and 11:30. Was he alone?

A. No.

Q. Who was with him?

A. He was with two other people, Gola and Zef.

Q. Who is Gola?

A. Gola is a fellow that come out to the house. That's his cousin.

Q. Do you know his last name?

A. No, I don't.

Q. Who is Zef that you referred to?

A. I think his name is Clarence Robinson.

Q. Is that one of the defendants here in this case?

A. Yes.

Q. Is that the young man sitting back there?
A. Yes, it is.
Q. What happened after they got back?
[fol. 137] A. Well, well, he come by.
Q. When you say "he", you are referring to Mr. Harris?
A. Nathaniel, and Gola asked him to borrow his car, and he give Gola the key and told him not to let Zef drive his car, and when he finished to come back by the house, to bring the car back by the house.
Q. Did Nathaniel Harris stay there?
A. No.
Q. Nathaniel Harris did not stay at your house?
A. He stayed there that night.
Q. That is what I'm asking you. You said no.
A. Yes.
Q. How long was he there?
A. He was there until the early morning.
Q. When you say "early morning", what time do you mean, approximately?
A. Approximately 3:00 or 4:00.
Q. Anything unusual occur while you were there?
A. Well, yes. Gola came by during that time and said that he had——

Mr. Lynch: Your Honor, for the purpose of Clarence Robinson, I will have to object to any hearsay testimony as to Clarence Robinson at this time.
The Court: Be sustained.
Mr. Wilson: Just a minute, your Honor.

[fol. 138] (Whereupon, proceedings were had off the record and in the presence but out of the hearing of the jury.)

The Court: Do I understand you want to withdraw your objection?
Mr. Lynch: He may ask the question.
Mr. Wilson: Will you read the question?

(Whereupon, the reporter read the question.)

By Mr. Wilson:

Q. You may answer the question.
A. Yes.
Q. What occurred?
A. Well, during that time Gola Mason came back and he—I heard him repeat that he had got busted, and Nathaniel asked him where were the car, and later on the phone rang and I heard Nathaniel repeat, "Get my car, Zef."
Q. That is all that you heard?
A. That is all that I heard.
Q. What time did you say, now, that Nathaniel Harris left your house that morning?
A. Well, I don't know exactly. It was early in the morning.
Q. Can you approximate the time?
A. I imagine about 6:00 or so.
Q. When he left?
A. Yes.

Mr. Wilson: I have no further questions.

[fol. 139] Cross examination.

By Mr. Tucker:

Q. Miss Draper, how long have you known Nathaniel Harris?
A. About three years.
Q. About three years?
A. Yes.
Q. Is that a casual relationship?
A. Well, I wouldn't say casual.
Q. Is it an intimate relationship?
A. Yes.
Q. You say Nathaniel wanted to see this baby, that was his reason for coming by there?
A. Yes.
Q. Did Nathaniel have any particular interest in seeing this baby?
A. Yes.

Q. What is his interest?
A. He's the father.
Q. Nathaniel Harris is the father of this baby?
A. Yes, he is.

Mr. Tucker: No further questions.
Mr. Lynch: No questions, your Honor.
The Court: You can stand aside.

(Witness excused.)

The Court: Call your next witness.

[fol. 140] NATHANIEL HARRIS, being produced, sworn and examined in behalf of the defendants, testified as follows:

Direct examination.

By Mr. Wilson:

Q. Will you state your name, please?
A. Nathaniel Harris.
Q. You are one of the defendants in this case, is that right?
A. That's right.
Q. Mr. Harris, directing your attention to the late evening hours of February 7, 1956, and the early morning hours of February 8, 1956, and more particularly at an (sic) immediately after 11:00 p.m. on the evening of February 7th, will you explain to this court and jury just what your movements were on that evening?
A. My cousin, Zef and I went to my girl friend and my house on 1259 Aubert.
Q. Is that Grace Draper, the lady who just testified?
A. That's right.
Q. All right.
A. And Grace had just come home with the baby that day, which was the 7th, and there was snow on the ground, might not have been too much, but it was wet and damp, because I asked why was they letting Grace out of the [fol. 141] hospital on a day like that. I went to the house that night between 11:00 and 11:30, and after I got in the

house Gola looked at the baby, I don't know whether Zef looked at the baby or not, and I stayed in. Gola asked me to use the car. I carried Gola out in the hall and gave him the key.

Mr. Tucker: I'm going to object to this voluntary statement.

The Witness: I'm explaining what happened.

The Court: You just let the attorneys make their objections. The Court will rule on it. I think it would be better if you asked the questions.

Mr. Wilson: All right, sir, your Honor.

By Mr. Wilson:

Q. After you went into Miss Draper's home and you say you and your cousin had looked at the baby, and he asked you to use your automobile, what happened?

A. I gave Gola the key and told him to pick me up at 2:00 in the morning and don't let Zef drive my car. He's responsible for——

Mr. Lynch: I'm going to object to any testimony——

By Mr. Wilson:

Q. Don't volunteer any statements, Mr. Harris. Simply answer the question as directly as you can.

After you had given Gola the key to your car, where did you go?

A. I went to bed.

Q. At this same address?

[fol. 142] A. Yes.

Q. While you were in bed, did anything unusual occur?

A. Anywhere before day, my cousin came back to the house.

Q. Just a minute, you say sometime before day; can you approximate the time?

A. Well, it was around—I don't know, because I was asleep. He woke me up. It had to be after 3:00, though, because I was asleep, I guess, I don't know exactly what time it was.

Q. What else?

A. I went to the door and opened it.

Q. When you went to the door what happened?

A. My cousin was standing in the door with no coat and hat on and in his shirt sleeves.

Q. Yes.

A. He came on in. I said, "What's the matter?"

Mr. Lynch: I object to any hearsay testimony on the part of this witness as to any person not in this court and has no privilege of this defendant to cross examine him.

The Court: Be overruled, but do not state any mention made with respect to defendant Robinson.

By Mr. Wilson:

Q. Don't make any statement, your understand, in connection with defendant Robinson.

A. All right.

Q. All right, you may proceed.

[fol. 143] A. Robinson didn't come there.

Q. Just remember, don't make any statement in connection with defendant Robinson. What did Gola say when he got there?

A. He said, well, in the house where he was the police broke in.

Q. All right.

A. And I asked him, I said, "Where is my car?" He said, "Over on the street." I says, "What street?" He said, "The girl's house."

Q. Was anything further said?

A. I asked him, well, there was something else said, but——

Q. All right. About what time did you say that was?

A. That was anywhere after 3:00 o'clock.

Q. What did you do then?

A. I put my pants on.

Q. And did you subsequently get your automobile?

A. No, I did not.

Q. Were you ever arrested by the police?

A. Was I what?

Q. Were you arrested by the police in connection with this matter?

A. No, I gave myself up the next day to Officer Grimes.

Q. You say the next day, when was that, February 9th?

A. No, the same day, the 8th, after they found out—they went to my house and checked my license number and [fol. 144] went to the house to see who had possession of that car. I went home and my mother told me the police was going to my home, and I went downstairs and called Officer Finney Grimes on the corner, and he locked me up, carried me to headquarters.

Q. While you were at headquarters, did you see Officer Robert Foxworth?

A. Well, yes, I saw him.

Q. What was the occasion for your seeing him?

A. Well, they brought me out of the cell to take me upstairs.

Q. Just a minute. You say they brought you out. Who brought you out?

A. Fingerprint in central headquarters, the one when they lock you up, they take your picture and take fingerprints. They carried me on the same floor in the back to fingerprint me and it was a small room where anybody on the outside, they cannot see in there.

Q. Then what happened?

A. It was about seven or eight of us in the room, and two white detectives, as I later learned, was standing in——

Mr. Tucker: I object to what he later learned as to white detectives.

The Witness: Well, I found it out when I come out of the room.

The Court: Be overruled.

[fol. 145] By Mr. Wilson:

Q. You may proceed.

A. So someone out there said, "Nathaniel Harris, come out", out of the room where I was. I thought they was calling me for my fingerprint. I got up and walked out in the hall and started back where I usually get fingerprinted. They were up at this end. They said, "No, come this way."

I turned around and went back up there. This colored officer, another colored officer and two white officers was standing there on the outside of the bar and asked me where did I get locked up at. I told them Sarah and Finney, and at the same time this colored officer with the glasses reached over and was peeking at me, but he did not—could not see in the room, and if you'll take us back over there I can show you where he can't look in there.

Q. I don't want you to make any voluntary statements.

A. And I don't want to be framed.

Q. Mr. Harris——

The Court: Let's don't get into that. You've got a lawyer and he's taking care of it, and you will have to conduct yourself right or you will get yourself in serious trouble with the court besides the charge they have got against you here. Let's just be calm on the witness stand.

By Mr. Wilson:

Q. Don't make any voluntary statements and let's not show any display of temper.

The fact remains, you were not arrested in this case; [fol. 146] you turned yourself in?

A. That's right.

Q. You were not at 4567 McMillan Avenue anytime between the hours of 11:00 p.m., February 7, 1956——

A. No, sir.

Q. (Continuing) —and 3:00 o'clock February 8th?

A. No, sir, I wasn't. Officer Foxworth came to my house——

Q. Just don't make any voluntary statements.

That is all.

Cross examination.

By Mr. Tucker:

Q. You knew Officer Foxworth before this?

A. I never saw him before to know him, never in my life.

Q. You don't know him?

A. No.

Q. When he says that he was looking through that windo (sic) and saw you sitting there, he is wrong, is that right?

A. He's wrong.

Q. He's either mistaken or lying?

A. He's doing one of the two.

Q. Officer Foxworth says that he saw you sitting in the cell or locked up or whatever it was with a number of other people, and says that he indicated that you were the man he saw the night before. In that case, he must be lying, is that right?

[fol. 147] A. If you want to put it lying, he was lying.

Q. Yet you have never seen him before?

A. Not until they carried me in there, you know, brought me out of the cell and he was there with those glasses on.

Q. You didn't even know the man before this time?

A. Prior to this trouble, I didn't know him. I never saw him to know him.

Q. When you gave yourself up the next day, you knew that the police had been looking for you?

A. Yes, sir.

Q. That is why you gave yourself up?

A. Yes, sir.

Q. It was just a matter of giving yourself up before they caught you, is that right?

A. Well, I mean I hadn't did anything. I didn't see no reason they had.

Q. If they wanted to find you, they could find you?

A. Yes, they knew where to find me.

Q. Ever been convicted of a felony, Mr. Harris?

A. I have.

Q. How many times?

A. Maybe about two or three.

Q. Been convicted of assault with intent to rob?

A. That's right.

[fol. 148] Q. Larceny from a person?

A. That's right.

Q. Attempt to incite a riot and an attempt at sodomy?

A. No, I never been convicted of that.

Q. Spent two years up at Jefferson City on that?

A. That's right; not for that, though.

Q. That was in 1939, wasn't it?

A. I don't know. I can't remember when it was, but it wasn't for that.

Q. Convicted of another felony in 1944, weren't you?

A. No, I wasn't.

Q. Weren't convicted of robbery in the first degree, grand larceny?

A. Not in 1944. 1943, I left to go to Jefferson City for a seven-year sentence.

Q. '43 instead of '44?

A. That's right.

Q. You got seven years?

A. That's right.

Mr. Tucker: That's all.

Mr. Lynch: I have no questions, your Honor.

The Court: Any more questions?

Mr. Wilson: No, sir.

The Court: You can stand aside.

(Witness excused.)

The Court: Call your next witness.

[fol. 149] Gola Mason, being produced, sworn and examined in behalf of the defendants, testified as follows:

Direct examination.

By Mr. Wilson:

Q. Will you state your name, please?

A. Gola (spelling) G-o-l-a Mason (spelling) M-a-s-o-n.

Q. Where do you live, Mr. Mason?

A. Dayton, Ohio.

Q. Do you know the defendant, Nathaniel Harris, in this case?

A. I do.

Q. Are you related to him?

A. First cousin.

Q. You're his first cousin, is that right?

A. That's right, two sisters' kids.

Q. Mr. Mason, before you testify, I have informed you of your rights and position in which you are placing yourself by testifying, is that right?

A. Yes.

Q. With that understanding, you want to testify, is that right?

A. That's right.

Q. Now, directing your attention, Mr. Mason, to the late evening hours of February 7, 1956, and the early morning [fol. 150] hours of February 8, 1956, where did you first see Nathaniel Harris?

A. I saw Nathaniel that Sunday morning. I got in St. Louis at 7:30 on that Pennsylvania. I saw him about 9:00 o'clock that Sunday morning. That would be on the 6th.

Q. I'm talking about 7th, now, which was the next day.

A. You say when I first saw him?

Q. On the 7th.

A. On the 7th?

Q. Yes.

A. It was in the morning. Yes, it was in the morning. He came to the house.

Q. All right.

A. The 7th was on a Monday, wasn't it?

Q. The day I'm not sure of myself.

A. Yes, on a Monday.

Q. But let's get to about 11:00 p.m. on the night of the 7th. Did you see Mr. Harris at that time?

A. That's right.

Q. Where did you first meet him, about that time?

A. Him and I and Mr. Robinson was up on some street to a Chinese restaurant.

Q. Are you familiar with the streets in St. Louis?

A. I imagine it was Easton.

Q. I didn't ask you that. Are you familiar with the [fol. 151] streets?

A. No, no.

Q. So you don't know exactly which street it was?

A. No, but I know I was in a Chinese restaurant because I was eating a pepper steak and Mr. Robinson was eating a sandwich and we was all sitting there.

Q. About what time of night was that?

A. That was about, I imagine, about 12:00 o'clock that night.

Q. 12:00 o'clock that night?

A. I imagine about 12:00, yes.

Q. You have no way of being sure?

A. No.

Q. Where did you go after you finished eating?

A. We went to 1259 Aubert.

Q. You say "we", who——

A. We three, all three of us.

Q. After you got there, what happened?

A. Well, I asked Nathaniel to lend me his car.

Q. Did he loan it to you?

A. He did. He said he wouldn't lend it to Robinson, but I was in charge of the car. He said, "Bring the car back about 2:00 o'clock." I said, "Okay." He said, "I'm lending you this car. If anything happens to this car you's the one responsible for this car."

[fol. 152] Q. So you took the car?

A. He gave me the keys; because I didn't know the streets, I let Mr. Robinson drive the car.

Q. You say you and Mr. Robinson left the Aubert Avenue address?

A. We left 1249 Aubert.

Q. Did Harris go with you?

A. He didn't.

Q. As far as you know, did he remain there?

A. He stayed there.

Q. Now, later on, in the morning hours, which would have been February 8th, were you at the address of 4567 McMillan Avenue?

A. That's right.

Q. While you were there, did anything unusual occur?

A. Well, when me and Mr. Robinson got in there, that is what I saw laying on the bed, on a mirror.

Q. Listen to the question intently and give me a direct answer to the question when I ask you: Did anything unusual occur while you were at 4567 McMillan?

A. Yes.

Q. What happened?

A. Well, when me and Mr. Robinson got there, there was

some powders on the bed, on this mirror, and this cap was there on the bed beside the mirror, and me and Mr. Robin-[fol. 153] son got in this room and when I got in there I pulled my hat off and pulled my coat off. Then someone says, "Let's push the dresser behind the door." Then I pulled my coat off and help push the dresser behind the door, and then I squatted down beside the bed, was looking, see what happened, what was that, because I never saw anything like that before.

Q. Yes, then what else?

A. About that time, did all that, heard somebody walking, and one of the fellows said this was the police, "This is the police", and the lady, she said, she hollered out, "Who is that at my door?", while I was squatting down there. Mr. Robinson, the lady, was on the other side, I was on this side (indicating), then by that time he said, "This is the police", and then Mr. Robinson, he jumped out the window.

Q. What did you do?

A. Then the lady jumped out, left me sitting there. I said, "Well, it's time for me to move", and I jumped out on my all fours and I ran, jumped over—I got hung over the fence somewhere in the back there. I didn't have no hat on or no coat, and I ran somewhere up on the street and got a cab, then I got a cab and I said, "Take me to 1259 Aubert." When I got there I was blowing, scared. I didn't know what happened, scared, then I rang the doorbell and Nathaniel came to the door. He said, "What happened?" I said, "Man, I got up there and, man, some police broke [fol. 154] in that house. Man, I ran." He said—then by that time we walked on in the house, him and I, then he put on his clothes then and then by that time Mr. Robinson called.

Q. Don't say anything about what Mr. Robinson told you. Now, Mr. Mason, at anytime during that evening was Nathaniel Harris in that room?

A. Nathaniel Harris was home in the bed. He couldn't appear two places at once, because he was back at that house when I got back to that house.

Mr. Wilson: That is all.

Cross examination.

By Mr. Tucker:

Q. Mr. Mason, you have discussed this matter with Mr. Wilson, you say, this lawyer? You have talked about testifying with him?

A. When, just now, or some other time?

Q. Some other time?

A. I saw Mr. Wilson.

Q. When?

A. I don't know, was it—I believe it was on the 9th.

Q. The day after this incident, were you——

A. I imagine so, when Nathaniel and him was talking. I don't think I talked with him.

Q. Nathaniel Harris and Mr. Wilson were talking together, is that right?

[fol. 155] A. Yes.

Q. That was the day after the affair over on McMillan Avenue?

A. I imagine so. That's when he got his——

Q. Did you participate in that conversation?

A. Oh, no.

Q. You didn't have anything to do with it. When is the first time you had occasion to talk to Mr. Wilson?

A. I haven't talked with Mr. Wilson.

Q. You have never discussed this with Mr. Wilson?

A. No.

The Court: Let me state to you, you testified on direct examination you told him that he explained something to you?

The Witness: Mr. Wilson explained something to me?

The Court: That is what he asked you, and you said yes.

The Witness: About what?

The Court: You can proceed.

By Mr. Tucker:

Q. Did Mr. Wilson talk to you about your testimony in this case?

A. Oh, yes, yes, yes, yes, he talked to me about this here.

Q. When?

A. Well, I mean—about the 9th, yes.

[fol. 156] Q. Was this during the conversation Mr. Wilson was having with Harris or was it before then or after then?

A. It was on the 9th. He asked me would I get on the——

Q. When was it in relation to the conversation you saw Mr. Wilson having with Mr. Harris?

A. Well, I don't get what you mean?

Q. Well, just a moment ago you testified that on the 9th you saw Lawyer Wilson and Mr. Harris talking together?

A. Yes.

Q. Where was that?

A. I believe it was at his office.

Q. In Mr. Wilson's office?

A. In his office.

Q. What time was it?

A. I wouldn't know what time it was.

Q. In the morning, afternoon?

A. I think it was in the afternoon, 2:00 o'clock.

Q. About 2:00 o'clock?

A. I imagine about 2:00 o'clock.

Q. You were up in Mr. Wilson's office?

A. Yes, I was there.

Q. Were you in the office with Mr. Wilson and Nathaniel Harris?

A. No, I was sitting out in the lobby and they was in there by his desk talking.

[fol. 157] Q. Then Nathaniel came out, did you go in and talk to Mr. Wilson?

A. Yes, I talked to Mr. Wilson.

Q. Then you talked to him as long ago as the 9th of February?

A. Yes, sir, I imagine it was on the 9th.

Q. A day or so after the affair on McMillan?

A. Yes, sir.

Q. I assume you told Mr. Wilson then what you told us here today?

A. Yes, I told him.

Q. Mr. Wilson advised you about your constitutional rights?

A. I don't know what you mean.

Q. Did he tell you you didn't have to testify?

A. He didn't say I didn't have to.

Q. Mr. Wilson didn't say anything about that?

A. He didn't say I didn't have to testify. He asked me would I get on the witness stand and testify.

Q. Mr. Wilson asked you would you get on the witness stand and testify?

A. Yes.

Q. Did he tell you that the Constitution says you don't have to testify?

A. He didn't tell me that.

[fol. 158] Q. He didn't tell you that? Have you talked to any lawyer other than Mr. Wilson?

A. I haven't.

Q. He's the only lawyer you have talked to?

A. That's right.

Q. Did Mr. Wilson tell you that this is a felony, a person can go to the penitentiary for this sort of an offense?

A. No, he never told me that.

Q. Mr. Wilson didn't tell you that?

A. No.

Q. When was the next time you talked to Mr. Wilson?

A. I don't know as I talked—I don't know as I talked to him any more.

Q. Haven't talked to him any more?

A. I don't remember.

Q. Well, now, you would remember if you talked to Mr. Wilson between February 9th and today?

Mr. Wilson: I object to that as argumentative.

The Court: Be overruled.

A. No, I remember talking to him, but I mean we been talking, see, when he been talking to Nathaniel I be listening to the conversation, I wouldn't be saying anything. I just be listening to the conversation, something like that, but me talking to him personally, no.

Q. You haven't talked to Mr. Wilson at all since February [fol. 159] 9th?

A. No.

Q. Didn't talk to him yesterday evening after the trial?

A. Well, I wouldn't be talking to him. I be listening to him and Nathaniel talking. I be standing there.

Q. You didn't take any part in the conversation?

A. No.

Q. You haven't said one word to Mr. Wilson since February 9th?

A. "Hello, Mr. Wilson", something like that.

Q. That is all. Nathaniel Harris is your first cousin?

A. That's right.

Q. You say he lives in Dayton, Ohio?

A. Dayton, Ohio.

Q. And you came down to St. Louis on the 7th, you say, February?

A. I came on that Sunday, on the 6th.

Q. The 6th. You just came for a visit?

A. I came to see my peoples, my auntie, my uncle, he's sick in the hospital, help auntie with him, turn him over in bed.

Q. Have you been back to Dayton?

A. No, I haven't been back to Dayton.

Q. Been working?

A. I have.

Q. Where do you work?

[fol. 160] A. I work for myself.

Q. What do you do?

A. Cement work, driveway.

Q. Cement worker, you say?

A. That's right.

Q. Where do you live?

A. I live with my auntie, 4550 Newberry Terrace.

Q. Does Nate live there?

A. No.

Q. He doesn't live there?

A. No.

Q. You live with your aunt and uncle?

A. Yes.

Q. Any other of your cousins live there?

A. My first cousin, her daughter.

Q. Who is that?

A. Anna May.

Q. There was testimony a few minutes ago that you came back and told your cousin that you had been busted?

A. Who told that?

Q. Well, now, I have difficulty recalling right now. I think——

A. I didn't say "busted." I said police broke in that room where we was.

Q. When, I think it was Miss Stamps, if it was Miss [fol. 161] Stamps, Miss Stamps testified—just one minute. There was testimony here a minute ago from one of the witnesses for the defense that you came back and said that you had been busted, is that wrong, sir?

A. I mean that is what she said.

Q. That's right. Was she wrong in it?

A. I mean I told you what happened.

Q. I'm just asking you if they said that you came back——

A. I mean that is what she said.

The Court: Wait a minute. You just answer the questions and give the lawyers a chance to object and if I sustain the objection, don't answer.

Mr. Wilson: I am going to object to anything any other witness testified to as not binding on this defendant.

The Court: Be overruled. This is cross-examination. Now who are you referring to?

Mr. Tucker: Miss Draper, testimony of Miss Draper, "Gola came back and said he got busted."

By Mr. Tucker:

Q. Now, was Miss Draper correct in that when she said you came back and said you got busted?

A. Miss Draper might have meant to say the police came in there, breaking in the window, and I ran, I jumped out of there on my all fours and run.

Q. Why did you run?

A. I don't know whether you call it busted or not.

[fol. 162] The Court: That is not what he asked you. Will you listen to the court or you will be in trouble. This witness took the stand, this woman sitting right back here, and swore on her oath that when you came back there you

stated that you had got busted. Now, what he's asking you is whether or not you made that statement. The answer to that is yes or no, and it doesn't take all that explanation about what happened over at some other place.

A. No, I didn't make that statement.

By Mr. Tucker:

Q. Now, you say you jumped out the window, is that right?

A. That's right, I jumped out.

Q. You didn't have anything to run from, did you?

A. To run from?

Q. Why did you run?

A. Because the rest of them ran.

Q. Were you doing something wrong?

A. Wrong?

Q. Yes.

A. How would you feel if you were in a strange place——

Q. Were you doing something wrong?

A. No, I was just sitting, just stooping down there looking at it.

Q. Never seen nothing like that before?

A. Never seen nothing like that before; first time I saw [fol. 163] anything like that.

Q. Didn't know what that white powder was?

A. Didn't know what it was.

Q. How did you get in the place?

A. I went with Mr. Robinson.

Q. How did you get into the room?

A. I went with him.

Q. Did he have a key?

A. No, he said he was going to see his girl friend.

Q. Did he knock on the door?

A. He knocked on the door.

Q. Did you roll the dresser over in front of the door?

A. I helped roll the dresser over.

Q. They have a new state narcotic law in the State of Ohio, don't they?

Mr. Wilson: I object to that.

The Court: Be sustained. Be stricken. The jury will disregard it. There's no occasion for it.

A. I don't know anything.

The Court: Don't answer the question when I sustain the objection.

By Mr. Tucker:

Q. Have you ever been convicted of felony?
A. No, I haven't.

Mr. Tucker: That is all.
Mr. Lynch: No questions.

[fol. 164] Redirect examination.

By Mr. Wilson:

Q. Mr. Mason, I want to clarify one point. You did talk to me in my office, as you had testified here. You don't remember the date?
A. No.
Q. And at the time that you talked to me, didn't I advise you that you were placing yourself in jeopardy to testify here?
A. That's right.
Q. So that you were informed as to what you would be doing if you testified here, is that right?
A. That's right.

Mr. Wilson: No further questions.
The Court: Any more questions?
Mr. Tucker: No questions.
The Court: You can stand aside.

(Witness excused.)

Mr. Wilson: That is the defendants' case, your Honor.
The Court: Do you have any testimony?
Mr. Lynch: That is the defendants' case, your Honor.
The Court: Any rebuttal?
Mr. Tucker: No rebuttal.
The Court: Gentlemen of the jury, you can file out at this

[fol. 165] time, because when I finish talking with the attorneys I am going to take a ten-minute recess.

(Whereupon, proceedings were had off the record and out of the presence and hearing of the jury.)

The Court: Announce a ten-minute recess.

(Whereupon, a short recess was taken, pursuant to which the trial proceeded as follows:)

[fol. 194] Afternoon Session, Tuesday, April 17, 1956

Pursuant to adjournment as aforesaid, at two o'clock p.m. of said Tuesday, April 17, 1956, the court met, present and presiding as before, and the trial continued as follows:

COURT'S CHARGE TO THE JURY

The Court: Mrs. Hildebrand and gentlemen of the jury, you have heard the evidence and the argument and it now becomes my duty to give you instructions as to the law which you will use and be governed by and apply to the facts in this case in reaching your verdict on the questions that are presented to you for your decision.

You now approach the performance of one of the most sacred duties of citizenship, the meting out of justice. Justice does not flourish amidst emotional excitement and stress.

The rich and the poor, and persons of every race, creed and condition, stand alike before the bar of justice, and you must consider and weigh the evidence carefully, calmly and dispassionately, without the slightest evidence of prejudice against or sympathy with any part (sic) to this proceeding.

You must always bear in mind that these three persons are charged before you as three individuals, the guilt or innocence of each one of whom you must decide separately.

In this case, as in all cases that are tried by a jury, though from the attitude you have displayed throughout this case, [fol. 195] you are doubtless well aware of it, you are a part of the administration of justice, a very important part. You are just as important as the judge who sits on the

bench. You are, as the jury in this case, just as much officers of this court as the judge of this court. I like to think of you as twelve judges sitting in the box to determine the facts, and myself as one judge sitting on the bench to determine the law. Therefore, it is just as necessary and vital to the administration of justice that you perform your duties as jurors and officers of this court, conscientiously, honestly, fairly, impartially, and in accordance with the law, as you receive it from me, as it is that I, as the judge of this court, so conduct myself.

In approaching and performing your duties you should have but one purpose. You should have a zeal and a determination to do justice, exact and impartial, between the prosecution on one hand and the defendants on the other. Under the practice in this court the charge as to the law is given orally, as I am now giving it to you. Some of you already served as jurors in this court and you know the practice. Some of you may not have served—I am not sure—but the charge is given to you orally. Therefore, it is necessary that you pay strict and close attention, and I am sure you will, just as you have throughout this trial, so that you can carry it with you when you go to your jury room, and use it and apply it in deciding the factual issues [fol. 196] that are going to be submitted to you.

Now, in giving you this charge I don't give you separate instructions. I give you one charge, and the charge is given you as a whole, to be used and applied to the case as a whole, and it would be highly improper if you should disregard a part of the charge and use only the remainder, because in that event the charge would not fit the case. Unless otherwise indicated, each instruction given you should be considered by you as referring separately and individually to each defendant on trial. Members of the jury, it is your sole duty in this case to pass upon the guilt or innocence of the defendants, and each of the defendants, under the indictment which I have presented to you. You have nothing to do with the fixing of the punishment. If you find the defendants, or either of them, guilty on one or both of the counts of the indictment, then it becomes the duty of the court to assess the punishment. You should bear in mind, members of the jury, that the indictment in

this case, which has been referred to by the court, is not to be considered by you as any evidence of the guilt of the defendants, or either of them. It is merely the manner by which the case is brought before you for your consideration, and the fact that an indictment has been returned by the grand jury ought not to be considered by you as any evidence of the guilt of the defendants, or either of them.

[fol. 197] In this case, members of the jury, you must, of course, bear in mind that you are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in passing upon the evidence and in passing upon the factual issues of the guilt or innocence of each of the defendants, you should be guided and should determine those matters according to certain rules of law which it is the duty of the court to give you, and you should accept these rules of law and follow them and apply them in deciding the factual issues. You should do that whether or not you agree with the rules of law that I give you. It is your duty to follow the law as you receive it from the court.

If in the course of these instructions, and if during the trial, I have said anything that indicates to you how the court might feel or how you think the court feels with respect to the testimony in this case, and that opinion is different from your opinion of the testimony, you are to accept your opinion of the testimony rather than the court's, because it is your sole province to pass on the testimony, and from the testimony you pass on the credibility of the witnesses, and with that the court has nothing to do, just as you, as members of the jury, have nothing to do with determining what the law is in this case.

In this case the prosecution is based upon two statutes. [fol. 198] They are acts of Congress, and federal law, which read as follows: The relevant part of the statute under the terms of which the first count of the indictment was drawn, is substantially as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie

evidence of a violation of this subsection by the person in whose possession the same may be found."

The relevant part of the statute under the terms of which the second count of the indictment was drawn, is substantially as follows:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, shall upon conviction be punished as provided in the statute,"——

and then the statute further provides as follows:

[fol. 199] "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury,"——

and then the statute provides the penalty, with which you are not concerned.

Now, those are the statutes upon which the prosecution is based.

The indictment in this case, based on the statutes, omitting the formal commencement, reads as follows:

Count One

"The Grand Jury charges:

"That on or about the 8th day of February, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri,

Nathaniel Harris,
Clarence Robinson
and
Gladys Stamps,

the defendants, did unlawfully purchase from a person whose name is to the Grand Jury unknown, at and for a price and sum unknown, a certain narcotic drug, to wit, 224 grains, more or less, of heroin, which said narcotic drug defendants did purchase other than in [fol. 200] or from the original stamped package containing the same.

"In violation of Section 4704(a), Title 26, United States Code."

The second count charges:

"That on or about the 8th day of February, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, Nathaniel Harris, Clarence Robinson and Gladys Stamps, the defendants, did receive and conceal, and facilitate the concealment of, a certain narcotic drug, to wit, 224 grains, more or less, of heroin; they, the said defendants, then knowing said narcotic drug had been imported into the United States of America contrary to law.

"In violation of Section 174, Title 21, United States Code."

So the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug on the 8th day of February of this year, out there in the room at 4567 McMillan, identified here in evidence.

In connection with the indictment which I have just read to you, the references that have been made to it during the trial, and the use that you will make of it during your [fol. 201] deliberations, I say to you, the indictment constitutes no evidence of any character in this case against the defendants, or either of them. It does not raise a suspicion of guilt as to any of the defendants, and you will

not consider it when you retire to the jury room, as containing or constituting any evidence whatsoever of guilt against the defendants, or either of them. The indictment, members of the jury, is merely the means—the physical means—by which a defendant is brought to a trial in a case of this character. Its sole function is to identify the offense with which the defendants are here charged, and that is the only use that you will make of it, as I have indicated to you.

You no doubt noticed that when I read the indictment, as well as the statutes, that the word "unlawfully" was used.

In this case the matter of intent is an essential element which must exist in order for the accused to be criminally liable. Therefore, in order to find the defendants, and each of them, guilty, you must not only believe that the defendants, and each of them, did the acts complained of, and of which the defendants, and each of them, stand charged, but you must also believe that the acts were intentionally and knowingly done by such defendants, and each of them.

You are advised that the term which the indictment and the statutes contain of "unlawfully", is to an extent used in a technical sense. "Unlawfully" means without legal [fol. 202] justification or without authority of law.

The defendants, and each of them, members of the jury, are presumed to be innocent of the charge against them set forth in the indictment, and that presumption is not a meaningless phrase to be cast aside. That presumption applies to every element of the charge against a defendant, and remains with the defendants, and each of them, until the evidence in the case overthrows it, and you are satisfied beyond a reasonable doubt that any defendant is guilty of the charge set forth in the indictment. There is no obligation upon the defendants, or either of them, to prove his or her innocence. The burden of proving the guilt of each of the defendants rests upon the prosecution. That burden never shifts, and that burden cannot be sustained, unless and until the proof offered by the prosecution in the case convinces you beyond a reasonable doubt of the guilt of the defendants, and each of them.

The term "reasonable doubt" which I have just used, has a very definite meaning, and I will tell you what it means:

A reasonable doubt, as I use that term in this instruction and this charge, means a doubt based upon reason, arising out of the evidence or lack of evidence in the case. A reasonable doubt is such a doubt as leaves a juror's mind so undecided that he does not have an abiding conviction of the defendants' guilt, after a full and fair consideration of [fol. 203] all the evidence, that is, a settled condition of guilt, which a juror believes will remain unshaken by future thought or reflection.

A reasonable doubt is such a doubt as would cause a reasonably thoughtful and prudent person to hesitate to act if confronted with a question of importance concerning his own affairs. But a reasonable doubt does not arise from mere conjecture, speculation, or whim, nor from reluctance to convict through feelings of sympathy or mercy. A reasonable doubt is a conscientious belief arising only after calm, dispassionate, and impartial consideration of all the evidence, that there is a reason to doubt the defendant's guilt.

Let me say to you further on this subject, members of the jury, it is not necessary for the government to prove the guilt of the defendants, or any of the defendants, beyond all reasonable doubt. If that were the rule, few men, however guilty they might be, would be convicted. In this world of ours, it is practically impossible for a person to be absolutely and completely convinced of any fact, which by its nature is not susceptible of mathematical proof and certainty. In consequence, the law is such that in a criminal case it is enough that defendant's guilt be established beyond a reasonable doubt, and not all possible doubt.

Bearing these observations in mind, it becomes your duty to carefully consider the evidence before you, and if, as a result of such consideration, you can and do entertain a [fol. 204] reasonable doubt as to the guilt of the accused, or any of them, it will be your duty to give such defendant, or defendants, the benefit of such doubt, and acquit such defendant, or defendants, on which you have such a doubt. If, on the other hand, the evidence, when carefully examined and considered, produces in your mind a settled conviction or belief of the guilt of one or more of the accused, belief beyond a reasonable doubt, you may be said to be free

from reasonable doubt, and should accordingly find a verdict in accordance with that conviction and belief.

For your guidance and assistance, I shall now discuss briefly the contentions of the prosecution and those of the defendants.

It is the position of the prosecution that the defendants, Nathaniel Harris, Clarence Robinson and Gladys Stamps, under Count 1 of the indictment, had unlawfully purchased 224 grains, more or less, of heroin, which was in the defendants' possession on February 8, 1956, at 4567 McMillan, and as to Count 2, it is the position of the prosecution that the defendants, Nathaniel Harris, Clarence Robinson and Gladys Stamps, on the 8th day of February, 1956, at 4567 McMillan, did conceal and facilitate the concealment of 224 grains, more or less, of heroin, knowing said heroin had been imported into the United States contrary to the law.

The defendants, Clarence Robinson and Gladys Stamps, [fol. 205] deny this. The position of the defendant, Nathaniel Harris, is that he was not at 4567 McMillan on February 8, 1956. The jury is instructed that the defense in this case of Nathaniel Harris, is what is known in law as an alibi, that is, that the defendant, Nathaniel Harris, was not present at the time and place of the commission of the offense charged in the indictment, but that he was at that time at another and different place. As to this defense you are instructed that it is not necessary for defendant, Nathaniel Harris, to prove an alibi to your satisfaction beyond a reasonable doubt or by a preponderance of the testimony, but if after a full and fair consideration of all the facts and circumstances in evidence you entertain a reasonable doubt as to whether or not the defendant, Nathaniel Harris, was present at the time and place of the commission of the offense charged in the indictment, it will be your duty to give the defendant, Nathaniel Harris, the benefit of such doubt and acquit the defendant, Nathaniel Harris.

Now, under the law as provided for the offense charged in Count 1 of the indictment, for the unlawful purchase of a narcotic drug, the absence of appropriate taxpaid stamps from the narcotic drugs in ones possession shall

be prima facie evidence of a violation of the law on which Count 1 is based, as I read it to you, by the person whose possession of such drugs may be found. So, if you find and believe from all the evidence, beyond a reasonable doubt, [fol. 206] that the defendants, or either of them, possessed the narcotics mentioned in Count 1, and that the said narcotic did not bear the required Internal Revenue tax stamps, then you will find the defendants, or either of them, guilty as charged in Count 1. Unless you so find, you will find the defendants, and each of them, not guilty.

Now, under the law as provided for the offense charged in Count 2 of the indictment, the law provides that when on trial for receiving and concealing and facilitating the concealment of a narcotic drug, the defendants, or either of them, are shown to have had possession of such drug, such possession shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defendants, or either of them, explain their possession to your satisfaction. By explaining their possession to your satisfaction, as used in the statute, is meant that if the defendants, or either of them, had possession of the narcotic drug they will have to explain that it came to them legally, and without that explanation you would be authorized to find the defendants, or either of them, guilty as to Count 2 of the indictment. The possession contemplated by the statute which applies to Count 2 of the indictment need not be personal and exclusive. It need not be immediate. It is sufficient if the evidence shows the defendants, or either of them, to have had possession of the narcotic [fol. 207] on February 8, 1956, at 4567 McMillan.

The court instructs the jury that unless you find that the defendants, or either of them, had possession of the narcotics mentioned in Counts 1 and 2 of the indictment, and unless you find and believe that such narcotics were under the dominion and control of the defendants, or either of them, at the time and place mentioned in the indictment, you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2.

The court further instructs the jury that a person has possession of a [illegible] object who has physical control

of the thing or object with the intent to exercise such control, or having had such control, has not abandoned it and no other person obtained possession.

In this case you have both direct and circumstantial evidence. I want to explain to you the difference between direct and circumstantial evidence. I make a statement to you as to how I came downtown this morning. That would be direct evidence. That statement could be true or it could be false. Direct evidence can be as unreliable as any other type of evidence. On the other hand, circumstantial evidence may be as persuasive and as conclusive as the most positive direct evidence. That is, you can take a number of blocks scattered all over the floor. Upon their tops, let us say, are portions of a picture. In and of themselves [fol. 208] the pictures upon one block are practically meaningless, and yet you can assemble these blocks until you have a complete picture that anyone can recognize. When you put one of these jigsaw puzzles together you have an instance of the application of circumstances to a complete whole. And so here, in this case, you may take an incident in this case, and another incident and still another, and a fourth, and a fifth, and join them all together, and they may show you a complete event or picture, or action. On the other hand, when you put these circumstances together, they may fall short of showing a complete event or complete action.

Direct evidence is illustrated as where a witness says, "I saw this or that, I know this, I saw it." Circumstantial evidence is where a party undertakes to prove a fact as a deduction, or inference, from some other fact or facts shown in evidence. Circumstantial evidence is that character of evidence which tends to prove a disputed fact, by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that a fact exists, which is sought to be established. There is a great deal of conflict and always has been as to the relative value of direct and circumstantial evidence. So far as the law is concerned, you can prove a case either by direct or circumstantial evidence. Circumstantial evidence, therefore, is legal evidence. A jury must act upon circumstantial evidence the same as if it were

[fol. 209] direct evidence, when that jury is satisfied by such evidence beyond a reasonable doubt.

The weight to be given to circumstantial evidence can be stated very simply and the rule is this: To the extent that the prosecution's proof in this case is circumstantial, those circumstances relied upon to convict must be consistent with guilt alone and not consistent with innocence or the balanced hypothesis of either guilt or innocence. In order to justify a jury in finding a verdict of guilty based entirely or substantially on circumstantial evidence, the facts sought to be established by circumstantial evidence must not only be consistent with the guilt of a defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon the evidence.

Stated another way, not only must the facts relied on to show guilt be proved beyond a reasonable doubt, but such facts must be consistent with all other facts introduced in a chain of circumstances, and such facts must further be inconsistent with any other rational conclusion than that of guilt. Under the law the guilt of the defendants can be shown by circumstantial evidence, can be shown by direct evidence, and can be shown by a combination of direct evidence and circumstantial evidence. Whether it has is for you, yourselves, not me, to determine.

So I say to you, members of the jury, that you are to [fol. 210] consider all of the circumstances and conditions shown in the evidence, and if it appears to you, even though there is no direct evidence of the actual commission by the defendants of the offense charged in the indictment, a reasonable inference from all the facts and circumstances, does to your mind beyond a reasonable doubt, show the defendants, or either of them, guilty of the offenses charged in the indictment, you should make your deduction accordingly. If the evidence fails to convince you beyond a reasonable doubt of any defendant's guilt, you will find such defendant not guilty.

A careful and intelligent consideration of the facts and circumstances shown by the evidence in any given case enables us to infer with a reasonable degree of accuracy what another's intentions were in doing or not doing certain things. With a knowledge of definite acts we may draw

definite logical conclusions. We are in our affairs continually called upon to decide from actions of others what their intentions or purposes are. And experience has taught us that frequently actions speak more clearly than spoken or written words. You must, therefore, rely in part on circumstantial evidence in determining the guilt or innocence of the defendants, or either of them.

You have observed that there has been considerable testimony in this case, which may be properly designated as "expert testimony"; that is to say, the testimony of [fol. 211] persons skilled in some art, trade or science, or who have knowledge and experience in relation to matters which are not within the knowledge of men of common education and experience.

You are instructed that such opinion evidence as has been given in this case is competent evidence for your consideration, and in your deliberations you are entitled to give to such evidence such weight and value as you may think it entitled, measured by the same standard as you would weigh the evidence of any other competent witness in the case.

I need not remind you that the case bristles with issues of veracity. The testimony of some of the witnesses called by the prosecution is flatly contradicted by the testimony of witnesses called by the defendants. It is your function, and yours alone, to decide where the truth lies, remembering always that the prosecution has the burden of proof, and this burden, as I have already told you, is that of satisfying you beyond a reasonable doubt as to each essential ingredient of the crime charged.

And so we come to one of the crucial questions in the case. By what yardstick and in accordance with what rules of law are you to judge the credibility of the witnesses, including that of the defendants who offered themselves as witnesses?

This judging of testimony is very like what goes on in [fol. 212] real life. People may tell you things which may or may not influence some important decisions on your part. You consider whether the people you deal with had the capacity and the opportunity to observe or be familiar with and to remember the things they tell you about. You consider any possible interest they may have, and any bias

or prejudice. You consider a person's demeanor, to use a colloquial expression, you "size him up", when he tells you anything; you decide whether he strikes you as fair and candid or not. Then you consider the inherent believability of what he says, whether it accords with your own knowledge or experience. It is the same thing with witnesses. You ask yourself if they know what they are talking about. You watch them on the stand as they testify and note their demeanor. You decide how their testimony strikes you.

Take the matter of interest, for example. You may feel that some of the witnesses, whether for the prosecution or the defense, have an interest in the outcome of the case. Where a witness has a strong personal interest in the result of the trial the temptation may be strong to color, pervert, or withhold the facts. Or with all the honesty in the world a witness who has an interest in the case may unconsciously shade his testimony. On the other hand, such a witness may be telling the exact truth, despite his interest in the outcome. You must consider all the attendant circumstances in decid-
[fol. 213] ing whether and to what extent interest has affected the witness.

The greater a person's interest is in the case, the stronger is the temptation to false testimony, and the interest of the defendants who took the stand is of a character possessed by no other witness. Manifestly they have a vital interest in the outcome of the case. This interest is one of the matters which you may consider along with all the other attendant circumstances in determining the credence you will give to their testimony. Here again you may find that a defendant is telling the exact truth despite his obvious interest in the outcome.

What I have said concerning the interest of any witness applies with equal force to the matter of bias and prejudice. Where you find that any witness, whether called by the defense or by the prosecution, has any bias or prejudice for or against any of the parties, you will consider whether and to what extent such bias and prejudice has affected his testimony. Here again you must consider such bias and prejudice, where you find that it exists, in connection with all the attendant circumstances.

You will accordingly observe that, before reaching any conclusion as to whether or not you will believe the testimony of any particular witness, or as to whether you will believe part of the testimony of a particular witness and reject the rest, it is of the essence that you give considera-
[fol. 214] tion to all the circumstances bearing on the question of the credibility of the particular witness, as I have just indicated. For this reason you must be careful not to act in an arbitrary manner. Thus, you are not at liberty arbitrarily to say that simply because a witness is called by the prosecution or by the defendants, he or she is, therefore, more than usually credible or less than usually credible. Credibility cannot be determined by any such rule of thumb.

While you are not at liberty to reject the testimony of a witness arbitrarily, there are occasions when you may be justified in rejecting in toto. The law has a rule with a Latin name, "falsus in uno, falsus in omnibus", which applies to these occasions. It is: If you find that a witness willfully falsely testified to a material fact, you are privileged to reject all of his or her testimony, or if you elect to do so, you could believe part of it and accept that part of it which appealed to your reason, or which was corroborated by other credible evidence and reject the rest. It is the application of what we do every day, that when a person tells you a lie about an important matter you may say, "Well, I will never believe him again", or you may say, "Some of the things he told me I will accept because they jibe with everything else in my experience, or because they are corroborated by what I am told by someone whom I believe, but where that is not so I won't accept his testimony." So, here, if you find a witness cannot be trusted
[fol. 215] to observe his oath in one particular, you may say that you cannot believe or trust him in any other particular.

In this connection, I charge you that a material fact includes a fact bearing on the credibility of the witness, as well as those bearing directly on the issues in this case. Facts going to the credibility of a witness who has given material evidence are facts within this rule, and if you find

that any witness has willfully falsified with respect to any fact going to his credibility, you may disregard his entire testimony in accordance with the "falsus in uno, falsus in omnibus" rule with respect to which I have just given you instructions.

Evidence has been introduced in this cause showing prior conviction of the defendants, Nathaniel Harris and Gladys Stamps. You are not to understand that in the admission of this testimony the court is saying to you that because of a prior conviction the defendants, Nathaniel Harris and Gladys Stamps, cannot be relied upon to tell the truth in this case; but you may consider such evidence of prior conviction only as affecting their credibility as a witness in this cause.

It is the duty of counsel for both sides to present by way of objections, motions and similar procedural devices, matters of law affecting the case for my consideration and [fol. 216] determination. All such matters of law and their presentation by counsel, including motions of every name, nature and description, challenges, questions relating to the admissibility of evidence and things of that sort must be entirely disregarded by you. These are matters of procedure with which you have no concern. Neither the presentation of such matters by counsel for either side, nor any argument made in support or in opposition to any of them, have any bearing upon your deliberation. Put all such matters out of your mind. They should not influence you in any way in arriving at your verdict.

Counsel, in arguing this case, have commented upon the facts of the case. That is their privilege, and that is perfectly proper for them to do so, but if you find any variance between the facts as testified to by the witnesses and as have been stated by either counsel, in arguing the case, then you should disregard anything that is said by counsel as to the facts of this case which you believe to be at variance from what the witnesses testified to.

Generally speaking you, without doubt, have recognized that what I have said to you regarding the manner in which you should pass on the testimony of the various witnesses and things you should consider, that it simply means that you should use your own good judgment and sound common

sense, just as you would in acting upon the most vital and important matters pertaining to your own affairs. Pass on [fol. 217] the facts of this case in the light of your own knowledge of the natural tendencies and propensities of human beings.

Based solely on the evidence and under these instructions, free of any prejudice, sympathy, or bias, reach a verdict in this case. Carry on your deliberations, members of the jury, in a calm, cool and deliberate manner. You should freely consult with one another in your jury room in discussing any one of the issues. If any one of you should be convinced in his own mind that his view on the factual issues, or factual issue, in the case is erroneous, then such juror should not be stubborn, such juror should not hesitate to abandon a view, if the juror is convinced it is erroneous. It is entirely proper, it is a juror's duty to adhere to a view or conclusion which, in the juror's mind, after a full exchange of ideas and discussions, the juror believes to be correct and right, but no juror should substitute or accept the opinion of other jurors for his own opinion merely for the sake of expediency.

Now, members of the jury, just one last word: If you find that the evidence respecting the defendants, or either of them, is reasonably consistent with innocence, said defendants, or either of them, should be acquitted. If you find that the law has not been violated, you should not hesitate for any reason to render a verdict of not guilty. But, on the other hand, if you find, in accordance with these instruc- [fol. 218] tions, that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

You must bear in mind in passing on the guilt or innocence of the defendants when you retire to your jury room, each of the two counts of the indictment constitute a separate charge, and each count of the indictment should be considered by you in arriving at the guilt or innocence of each defendant separately. Under the evidence you must find each defendant guilty or not guilty as to each count of the indictment, and these instructions apply as to each count of the indictment, just as though the defendants were not

charged in other counts, as though one count in the indictment.

When all of you agree to a verdict, then the verdict is the verdict of you as a jury. Your verdict must be unanimous.

Instead of one form of verdict, you will find three forms of verdict to take with you to your jury room, and each will read as follows, the first one being:

"We, the jury in the above entitled cause, on the trial of the Indictment herein find as follows:

"We find the Defendant, Nathaniel Harris" and then a blank, "as charged in Count One of the Indictment herein." Into that blank you will write the verdict "Guilty" or "not Guilty" as you so find.

[fol. 219] It further states:

"We find the Defendant, Nathaniel Harris" and a blank again, "as charged in Count Two of the Indictment herein", and into that blank you will write "Guilty" or "Not Guilty" as you so find.

At the bottom is a place for the foreman to sign and a place for you to date it.

The other two verdicts are exactly the same except that the names are changed, and in one of them is Clarence Robinson, and in the other one is the name, Gladys Stamps. Into each of the blanks on each of the three you will write the words either "Guilty" or "Not Guilty" as you so find.

Under these instructions you may find all the defendants guilty or all of them not guilty, or you may find one or more of them guilty and the others not guilty, and this applies equally with respect to each count of the indictment as to the defendants. At any time during your deliberations you may return into court your verdict of guilty or not guilty with respect to any defendant as to whom you have unanimously agreed.

You will find a place for the foreman alone to sign the verdict as such, and when you retire to your jury room to deliberate on this case, you will select one of your member as foreman; and he will sign the forms of verdict and

[fol. 220] represent you as spokesman in any further conduct in this court of this case.

If during the course of your deliberations you decide that you want the indictment or any or all of the exhibits that were introduced, simply notify the bailiff by giving him a note, whom you will find outside your door, and any exhibits that you call for will be given to you.

Tom, take the jury out.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: Defendants may save their exceptions to the charge.

Mr. Lynch: Your Honor, defendant Clarence Robinson would like to object to the giving of the court's instructions not offered by the defendant.

Mr. Wilson: Defendants Nathaniel Harris and Gladys Stamps have no exceptions.

The Court: Announce a ten minute recess.

(Whereupon, the Court stood at recess awaiting the verdict of the jury.)

(Whereupon, the jury returned to the courtroom and the following proceedings were had and entered of record, to-wit:)

The Court: Members of the jury, have you arrived at a [fol. 221] verdict?

The Foreman: Yes, sir.

The Court: Will you pass it forward?

The Clerk: (Reading)

"UNITED STATES DISTRICT COURT
EASTERN DIVISION

EASTERN DISTRICT OF MISSOURI

No. 25825

Division 3

"UNITED STATES OF AMERICA, Plaintiff,

vs.

NATHANIEL HARRIS, CLARENCE ROBINSON and GLADYS STAMPS, Defendants.

VERDICT.

"We, the jury in the above entitled cause, on the trial of the Indictment herein find as follows:

"We find the Defendant, Clarence Robinson Guilty as charged in Count One of the Indictment herein.

"We find the Defendant, Clarence Robinson Guilty as charged in Count Two of the Indictment herein."

"We find the Defendant, Nathaniel Harris Guilty as charged in Count One of the Indictment herein.

"We find the Defendant, Nathaniel Harris Guilty as charged in Count Two of the Indictment herein."

[fol. 222] "We find the Defendant Gladys Stamps Guilty as charged in Count One of the Indictment herein.

"We find the Defendant Gladys Stamps Guilty as charged in Count Two of the Indictment herein."

Signed by "Scott G. Richman, Foreman. Dated this 17th day of April, 1956."

The Court: Is that your verdict, members of the jury?

The Jury: It is.

* * * * * * * * *

[fol. 223] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 28525(3) Criminal

UNITED STATES OF AMERICA

v.

NATHANIEL HARRIS

JUDGMENT AND COMMITMENT—April 27, 1956

On this 27th day of April, 1956 came the attorney for the government and the defendant appeared in person and with Robert E. Wilson, Jr., his attorney.

It Is Adjudged that the defendant has been heretofore convicted upon his plea of not guilty and a verdict of guilty of the offenses of unlawfully purchasing at and for a price, a certain narcotic drug, to wit, 224 grains, more or less, of heroin, which said narcotic drug defendant did purchase other than in or from the original stamped package containing the same; receiving and concealing, a certain narcotic drug, to wit, 224 grains, more or less, of heroin, said defendant knowing said narcotic drug had been imported into the United States of America contrary to law, as charged in counts 1 and 2 of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years as to and under the charge contained in count one

of the indictment; Five (5) Years as to and under the charge contained in count two of the indictment, such term of imprisonment to run consecutively with the term of imprisonment of five years imposed upon said defendant under count one of the indictment, making an aggregate term of imprisonment imposed herein upon defendant of Ten (10) Years; and punishment of said defendant under Each of counts one and two herein further fixed at a fine of One Dollar ($1.00) and defendant to pay the costs herein, making an aggregate fine of $2.00 and costs, collectible on execution, for which said fine and costs let execution issue upon the filing of a praecipe therefor by the United States Attorney.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Roy W. Harper, United States District Judge.

The Court recommends commitment to: a penal institution to be designated. /s/ James J. O'Connor, Clerk.

[fol. 224]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,573

NATHANIEL HARRIS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

OPINION—October 2, 1957

Sidney M. Glazer (Morris A. Shenker and Bernard J. Mellman were with him on the brief) for Appellant.

Robert C. Tucker, Assistant United States Attorney (Harry Richards, United States Attorney, and Robert E. Brauer, Assistant United States Attorney, were with him on the brief) for Appellee.

Before SANBORN, WOODROUGH, and VAN OOSTERHOUT, Circuit Judges.

WOODROUGH, Circuit Judge.

The appellant Nathaniel Harris was indicted together with Gladys Stamps and Clarence Robinson in two counts for (1) purchasing 224 grains of the narcotic drug heroin [fol. 225] other than in or from the original stamped package in violation of Sec. 4704(a), Title 26, United States Code[1] and (2) for receiving and concealing the heroin knowing that it had been imported contrary to law, in violation of Sec. 174, Title 21, United States Code.[2]

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[1] Sec. 4704 (a) Packages.

(a) General requirement. It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in

(a) General requirement. It shall be unlawful for any person the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Sec. 7237. Violation of laws relating to narcotic drugs and to marihuana.

(a) Violation of law relating to opium and coca leaves and marihuana. . . . whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years.

[2] Section 174 provides in part: Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any way facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been im-

The evidence on the jury trial tended to show that two St. Louis policemen, Nathaniel Robinson Jr. and Robert Foxworth, on duty as beat policemen at about two o'clock of the morning of February 8, 1956, went to the intersection of Page Boulevard and Taylor Avenue in St. Louis where they had a meeting with someone to get information, then went to a certain four room apartment house at 4567 McMillan. They approached the house through the alley towards a lighted room on the ground floor. The house had two windows facing south. Officer Robinson stood on a can and looked into the room through a gap an [fol. 226] inch and a half wide between the shade and the sill of one of the windows. Foxworth stood on a grating and looked into the room through a similar view space in the other window. Officer Foxworth saw appellant Harris in the room, was close enough to him to reach him, and was positive of his identification. According to Foxworth, Harris was looking at something he was holding in his left hand and over which he made a motion with his right hand. Officer Robinson did not see Harris but he saw defendant Gladys Stamps in the room standing alongside Robinson, who was seated next to a bed on which there was some powder piled on a mirror. Robinson had his hand in the white powder on the bed. After short observation through the windows the officers entered the room together, but the inmates became aware of their approach and got out of the windows and ran away before the entry of the officers, leaving behind the powder on the mirror, some filled capsules, a box of empty capsules, some eye droppers with needles attached and a flour sifter. There were also capsules in a coat in the room. It was shown that the powder on the mirror was 42 grains of heroin and that there were 169 capsules filled with heroin. The heroin and para-

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ported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third offense or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.

phernalia were identified and put in evidence before the jury.

Bernard A. Theisen Jr., a narcotic agent employed in the St. Louis office, testified for the government that he had talked to the defendants Robinson and Stamps in the jail about two months after the occurrence at 4567 McMillan and each of them told him that the three defendants had been in the room (as claimed by the government) and that the heroin belonged to appellant Harris.

The defendant Robinson did not take the stand, but on the trial Harris and Stamps testified that Harris was not [fol. 227] present in the room at 4567 McMillan on the night of the raid. Stamps testified that the third person in the room at the time in question was one Gola Mason. Gola Mason was called as a witness and corroborated Stamps' testimony. He swore positively that he was present, saw the powder and paraphernalia and that Harris was not there. He said he ran away with the others on the approach of the officers.

Grace Draper, a witness for Harris, testified that on the night in question she had just returned to her home at 1259 Aubert Street from the hospital where she had had a baby. Harris was the father of her baby and had not seen it. He came to her house between 11:00 and 11:30 on that night and left early in the morning at about six o'clock. She said that Gola Mason, who was a cousin of Harris, also came to the house and made statements in her hearing indicating that he had been at the scene of the police raid. All of the defendants were convicted on both counts and Harris was sentenced to an aggregate term of 10 years imprisonment and a fine of one dollar.

Harris appeals and contends for reversal:

(1) that the evidence was insufficient to support the verdict; (2) that hearsay evidence which was very prejudicial to him was erroneously received; (3) that the court erred in instructing the jury and (4) that the court erred in imposing cumulative sentences against him.

1. Examination of the evidence convinces that there was competent and material evidence that Harris was present with the other defendants in the room at 4567 McMillan

where unstamped heroin was being handled, that Harris was "shown to have had possession of it," and to be a "person in whose possession it was found" within the [fol. 228] meaning of the sections of the statute on which the indictment was rested. It is fairly inferable from the picture presented by the evidence and the jury could well have concluded that defendants, gathered in the room about their pile of heroin with the filled and unfilled capsules and paraphernalia for filling capsules and taking heroin, were engaged, as the government claimed, "in what is called in the vernacular of the business, 'capping up' heroin." The jury was not obliged to credit the evidence offered by Harris to establish an alibi.

2. Appellant contends the court erred in permitting the government witness Theisen to testify to hearsay statements made to him by the codefendants Gladys Stamps and Clarence Robinson. Theisen's testimony was that both Gladys Stamps and Clarence Robinson told him at the jail, nearly two months after the occurrence in question, that Harris was the owner of the heroin that was seized and was present in the room when and where the defendants had it. It is not seriously disputed that viewed from certain angles that testimony was hearsay. As to defendants Gladys Stamps and Clarence Robinson it was not hearsay but constituted a confession of guilt on their part and a description of their crime that was plainly admissible against each of them. The position of Gladys Stamps was different from that of Robinson because Gladys Stamps became a witness for Harris on the trial and gave testimony in support of his alibi. She swore that Harris was not in the room with her and Robinson or in possession of the heroin. Her contradictory statements to Theisen that Harris was in the room with her and Robinson, that the heroin belonged to Harris, and that he was the person from whom she (a confirmed narcotic addict) "copped" were also plainly admissible against her. Robinson did not take the witness stand.

[fol. 229] Appellant Harris did not raise the objection on the trial that the statements Gladys Stamps and Robinson had made to Theisen were hearsay against Harris. But

he was represented by counsel of his choosing, whose competency is not questioned, and may well have purposely determined to waive hearsay objection and let the statements be received in order to get the benefit of Stamps' testimony supporting his claimed alibi. In view of the apparent waiver of the hearsay objection it must be held that the court did not commit reversible error in receiving the testimony of Theisen in evidence or in not giving to the jury an explanation that was not requested, of the legalistic aspects in which the testimony should be disregarded as hearsay.

Discussion of such rulings or instructions for one in a position like that in which Harris stood on the trial of this case is found in the dissenting opinion of four members of the Supreme Court in *Delli Paoli* v. *United States,* 352 U.S. 246. Citing *Nash* v. *United States,* 54 F.2d 1006, 1007.

3. The instructions given by the court are attacked here on the ground that they permitted the jury to convict Harris if they found that he had the described heroin in his possession without requiring them to find as a fact as to the first count that he purchased the heroin and as to the second count that he did receive and conceal it knowing that it had been imported into the United States contrary to law. But the court read to the jury the provisions of Title 26, United States Code, Sec. 4704(a), Title 21, United States Code, Sec. 174, and the indictment charging defendants with violation thereof and the provisions by which possession of unstamped narcotic drugs is made prima facie evidence of a violation (26 United States Code, Sec. 4704(a)) and by which such possession "shall be [fol. 230] deemed sufficient to authorize conviction unless defendant explains the possession to the satisfaction of the jury." (21 United States Code, Sec. 174). The jury was sufficiently and correctly instructed of what it was necessary for them to find from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment.

4. Under his fourth point the appellant contends that the court erred in imposing cumulative sentences in respect to the two counts.

The record shows that on the return of the verdict in this case finding the defendant guilty on each of the two counts of the indictment, the court prescribed imprisonment for a period of five years as to and under the charge contained in count one and for a period of five years as to and under the charge contained in count two, the second term to run consecutively with the term imposed under count one. The court also declared concerning the two prescribed periods of imprisonment that they made "an aggregate term of imprisonment imposed herein upon defendant Harris of ten years."

This appeal was submitted at the May term in this year and on that submission a mistake was made as to the maximum penalty prescribed for the offense alleged in the second count and denounced in Title 21, United States Code, Sec. 174. Title 21, United States Code, Sec. 174 shows the maximum imprisonment for violation of that section to be ten years but the offense was committed as stated on February 8, 1956, and by amendment the maximum period of imprisonment made applicable for first offense under the section committed at that time is five years.

[fol. 231] Accordingly on the submission of the case at the May term, the court did not find it necessary to pass upon appellant's contention that the trial court erred in imposing cumulative sentences of five years upon each of the two counts in the indictment to run consecutively. The sentence to ten years imprisonment was considered as an aggregate sentence as declared by the trial court and as such was within the statutory maximum. When the amendment of the statute was called to our attention a rehearing was had and the question as to the periods of imprisonment imposed upon appellant was again presented and has been reconsidered.

The argument for appellant is in substance that the evidence showed only the single fact against him, that he had possession of the heroin, and nothing more and even if that fact was "prima facie evidence of a violation" and "authorized conviction * * * unless" [explained] the single fact could not justify two cumulative sentences.

If the question thus presented was of first impression it might be conceded that more than one answer would be possible, but the same question has often been considered by the federal courts and it is settled by unanimous and uniform decisions that separate and consecutive sentences for violation of the statutes here involved or their predecessors may be imposed, notwithstanding each offense arose from one common transaction. The latest case is *Gore* v. *United States,* 244 F.2d 763 which was decided by the court of appeals of the District of Columbia April 25, 1957, after the judgment herein was rendered on April 27, 1956.

In that case the defendant had been indicted in six counts respecting two sales of narcotics in violation of [fol. 232] Title 21, United States Code, Sec. 174 and Title 26, United States Code, Sec. 4704(a) and Sec. 4705(a) and after trial and conviction he had been sentenced to fine and imprisonment for from one to five years on each of the first three counts, the sentences to run consecutively. Similar sentences were imposed upon the last three counts to run concurrently with the first. Defendant subsequently moved for vacation or modification of the sentences under Title 28, United States Code, Sec. 2255 and his motion was denied. On the appeal taken from the denial the court of appeals of the District of Columbia reviewed the decisions on the question of cumulative sentences under the narcotic acts in its own and other circuits. It quoted from *Kendrick* v. *United States,* 99 U.S.App.D.C. 173, 238 F.2d 34 (1956) as follows:

> "A single act which violates two statutes is punishable under both, unless the offenses defined therein are identical. The test of identity is whether the same evidence will sustain both charges. If one of the offenses requires an element of proof which the other does not, a conviction of one does not bar prosecution for the other." Id., 238 F.2d at page 36.

and declared:

> "When Congress enacted 26 U.S.C. §§4704(a) and 4705(a), and 21 U.S.C.A. §174, it created three sep-

arate offenses. Each involves a different facet of the narcotics trade and each has different evidentiary requirements. This court and courts of a number of the other circuits, including the First, Fifth, Sixth, Seventh, Eighth and Ninth, have approved convictions and separate and consecutive sentences for violation of the same statutes involved here, or their predecessors, where each offense arose from one common transaction. And, as recently as January 2, 1956, the Third Circuit, in a well reasoned opinion by Judge Maris in *United States* v. *Brisbane,* 239 F.2d 859, a. [fol. 233] case identical to the present one, reached the same conclusion." 244 F.2d 763, 765.

The decision in the Gore case is in accord with the decision of this court in *McIntosh* v. *White,* 21 F.2d 934 (1927) and we are in accord with the Gore decision as presenting the law applicable to the question here involved brought up to the present. The imposition of separate and cumulative sentences herein of five years under each of the two counts of the indictment was not erroneous.

Appellant has also argued that the instructions to the jury were erroneous in that the court did not require the jury to find specifically that defendant had done the acts charged in the two counts of the indictment in order to convict, but the instructions fully and accurately covered the applicable provisions of the sections of the statutes and clearly defined the conditions for conviction. They were not excepted to and were without error.

Affirmed.

[fol. 234]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATHANIEL HARRIS, Appellant,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

JUDGMENT—October 2, 1957

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the District Court, Nathaniel Harris, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

October 2, 1957.

[fol. 235]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—October 11, 1957

On Consideration of the motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

October 11, 1957.

[fol. 236] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 237]

SUPREME COURT OF THE UNITED STATES

No. 591, October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—June 30, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 134.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. [redacted] 11

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

MORRIS A. SHENKER,
BERNARD J. MELLMAN,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

Prior to the Boggs Act, the maximum penalty which could be imposed under 21 U. S. C., § 174, was ten years. The desire of Congress to make the penalties for narcotics violators more uniform is defeated if under the circumstances of this case, some courts impose consecutive sentences and others concurrent sentences.[6]

Indeed the validity of **Blockberger** has been questioned by a concurring opinion in **Gore v. United States**, D. C. Cir., 244 F. 2d 763, 766, in the light of decisions of this Court in **United States v. Universal C. I. T. Credit Corp.**, 1952, 344 U. S. 218; **Bell v. United States**, 1955, 349 U. S. 81; **Price v. United States**, 352 U. S. 322, as follows:

> "It may be that the 'same evidence' test which has facilitated the fragmentation of crimes into multiple separately punishable components is being abandoned in favor of a 'same transaction' test."

Furthermore, the sections involved here were not in issue in **Blockberger**.

It is to be noted that this court has certiorari in cases presenting related problems. **Bartkus v. People of State of Illinois**, 352 U. S. 907; **Hoag v. State of New Jersey**, 352 U. S. 907, and **Ladner v. United States**, 352 U. S. 907.

2. The trial court in its instructions also equated the offenses charged to that of mere possession. After reading to the jury the statutes and the indictment under which the defendant was charged (R. 197-200), including the presumption statutes, the Court instructed that "the question under each count . . . resolves down to whether or not the defendants, or either of them, did possess this narcotic drug on the 8th day of February of this year, out there in the room at 4567 McMillan . . ." (R. 200). The Court then reiterated that if the jury found defend-

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[6] This conclusion would prevent the anomalous result that an illegal importer is subject to one less penalty than anyone else who purchases and distributes narcotics because he could not be guilty of purchasing drugs from other than the original stamped package.

ants in possession that "you will find the defendants" guilty under Count 1, and if the jury found defendants had possession and did not explain that possession came to them legally "you would be authorized" to find the defendants guilty under Count 2 (R. 205-206). The Court below made the same error in finding that these instructions sufficiently and correctly instructed the jury of what it was necessary for them to find "from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment."

Possession is not a necessary element of either of the substantive crimes which the two statutes define and the presumptions are merely statutory rules of evidence. The statutes here involved do not make it a crime to possess the narcotics but rather make it unlawful to purchase, sell, or distribute the narcotics, or, on the other hand, to receive and conceal the drug knowing that it has been imported into the United States contrary to law. The statutory presumptions raised by possession deal with the facts necessary to find a substantive offense, and do not define the substantive offenses themselves. The presumptions involved in these two statutes are mere rules of evidence dealing with the proof of the required facts necessary to a guilty verdict rather than actually finding such offenses.[7]

The trial court further instructed the jury that they could find all of the defendants guilty if they found "either of them" had possession. Such instructions were particularly prejudicial since petitioner's defense was to the effect that he had not been in the premises where the narcotics were found. Under these instructions, the jury could have convicted petitioner even if it believed all of his evidence.

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[7] *Roviaro v. United States,* 353 U. S. 53; *United States v. Brown,* 7 Cir., 207 F. (2d) 310.

3. The instructions did not require the finding of an additional fact in one count which the other did not have. In the absence of such a finding, cumulative sentences should not have been imposed. The jury was merely told to convict if they found possession of heroin in accordance with the statutory presumptions. But the jury was not specifically required to find the elements distinguishing the two offenses charged. At no point in the instructions did the Court inform the jury to find the additional fact or facts in one count which the other count did not contain, and which fact or facts constituted the basis for the indictment charging two separate offenses. Rather did the Court permit this finding of the sole element of possession to be the basis for a verdict of guilty on both counts of the indictment. While an instruction which rests on a presumption may be legally sufficient if it requires the jury to merely find the presumption, yet the failure to require the finding of an additional fact where both counts rest on substantially similar presumptions reduces the test in the **Blockberger** case to mere form. A cumulative sentence in a criminal case should not rest on such an equivocal charge to the jury on the main or basic issue.[8]

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS A. SHENKER,
BERNARD J. MELLMAN,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

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[8] Cf. *Bollenbach v. United States*, 326 U. S. 607.

APPENDIX.

OPINION.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 15,573.

Nathaniel Harris, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

(October 2, 1957.)

Sidney M. Glazer (Morris A. Shenker and Bernard J. Mellman were with him on the brief) for Appellant.

Robert C. Tucker, Assistant United States Attorney (Harry Richards, United States Attorney, and Robert E. Brauer, Assistant United States Attorney, were with him on the brief) for Appellee.

Before Sanborn, Woodrough, and Van Oosterhout, Circuit Judges.

Woodrough, Circuit Judge.

The appellant Nathaniel Harris was indicted together with Gladys Stamps and Clarence Robinson in two counts

for (1) purchasing 224 grains of the narcotic drug heroin other than in or from the original stamped package in violation of Sec. 4704 (a), Title 26, United States Code[1] and (2) for receiving and concealing the heroin knowing that it had been imported contrary to law, in violation of Sec. 174, Title 21, United States Code.[2]

The evidence on the jury trial tended to show that two St. Louis policemen, Nathaniel Robinson, Jr., and Robert Foxworth, on duty as beat policemen at about two o'clock of the morning of February 8, 1956, went to the intersection of Page Boulevard and Taylor Avenue in St. Louis where they had a meeting with someone to get informa-

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[1] Sec. 4704 (a) Packages.

(a) General requirement. It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Sec. 7237. Violation of laws relating to narcotic drugs and to marihuana.

(a) Violation of law relating to opium and coca leaves and marihuana. . . . whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years.

[2] Section 174 provides in part: Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any way facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third offense or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.

tion, then went to a certain four room apartment house at 4567 McMillan. They approached the house through the alley towards a lighted room on the ground floor. The house had two windows facing south. Officer Robinson stood on a can and looked into the room through a gap an inch and a half wide between the shade and the sill of one of the windows. Foxworth stood on a grating and looked into the room through a similar view space in the other window. Officer Foxworth saw Appellant Harris in the room, was close enough to him to reach him, and was positive of his identification. According to Foxworth, Harris was looking at something he was holding in his left hand and over which he made a motion with his right hand. Officer Robinson did not see Harris but he saw defendant Gladys Stamps in the room standing alongside Robinson, who was seated next to a bed on which there was some powder piled on a mirror. Robinson had his hand in the white powder on the bed. After short observation through the windows the officers entered the room together, but the inmates became aware of their approach and got out of the windows and ran away before the entry of the officers, leaving behind the powder on the mirror, some filled capsules, a box of empty capsules, some eye droppers with needles attached and a flour sifter. There were also capsules in a coat in the room. It was shown that the powder on the mirror was 42 grains of heroin and that there were 169 capsules filled with heroin. The heroin and paraphernalia were identified and put in evidence before the jury.

Bernard A. Theisen, Jr., a narcotic agent employed in the St. Louis office, testified for the government that he had talked to the defendants Robinson and Stamps in the jail about two months after the occurrence at 4567 McMillan and each of them told him that the three defendants had been in the room (as claimed by the government) and that the heroin belonged to appellant Harris.

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The defendant Robinson did not take the stand, but on the trial Harris and Stamps testified that Harris was not present in the room at 4567 McMillan on the night of the raid. Stamps testified that the third person in the room at the time in question was one Gola Mason. Gola Mason was called as a witness and corroborated Stamps' testimony. He swore positively that he was present, saw the powder and paraphernalia and that Harris was not there. He said he ran away with the others on the approach of the officers.

Grace Draper, a witness for Harris, testified that on the night in question she had just returned to her home at 1259 Aubert Street from the hospital where she had had a baby. Harris was the father of her baby and had not seen it. He came to her house between 11:00 and 11:30 on that night and left early in the morning at about six o'clock. She said that Gola Mason, who was a cousin of Harris, also came to the house and made statements in her hearing indicating that he had been at the scene of the police raid. All of the defendants were convicted on both counts and Harris was sentenced to an aggregate term of 10 years imprisonment and a fine of one dollar.

Harris appeals and contends for reversal:

(1) that the evidence was insufficient to support the verdict; (2) that hearsay evidence which was very prejudicial to him was erroneously received; (3) that the court erred in instructing the jury and (4) that the court erred in imposing cumulative sentences against him.

1. Examination of the evidence convinces that there was competent and material evidence that Harris was present with the other defendants in the room at 4567 McMillan where unstamped heroin was being handled, that Harris was "shown to have had possession of it," and to be a "person in whose possession it was found" within the

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. .....

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on October 2, 1957.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, pp. 13-22.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 2, 1957 (Appendix, infra, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

had made to Theisen were hearsay against Harris. But he was represented by counsel of his choosing, whose competency is not questioned, and may well have purposely determined to waive hearsay objection and let the statements be received in order to get the benefit of Stamps' testimony supporting his claimed alibi. In view of the apparent waiver of the hearsay objection it must be held that the court did not commit reversible error in receiving the testimony of Theisen in evidence or in not giving to the jury an explanation that was not requested, of the legalistic aspects in which the testimony should be disregarded as hearsay.

Discussion of such rulings or instructions for one in a position like that in which Harris stood on the trial of this case is found in the dissenting opinion of four members of the Supreme Court in **Delli Paoli v. United States**, 352 U. S. 246. Citing **Nash v. United States**, 54 F. 2d 1006, 1007.

3. The instructions given by the court are attacked here on the ground that they permitted the jury to convict Harris if they found that he had the described heroin in his possession without requiring them to find as a fact as to the first count that he purchased the heroin and as to the second count that he did receive and conceal it knowing that it had been imported into the United States contrary to law. But the court read to the jury the provisions of Title 26, United States Code, Sec. 4704 (a), Title 21, United States Code, Sec. 174, and the indictment charging defendants with violation thereof and the provisions by which possession of unstamped narcotic drugs is made prima facie evidence of a violation [26 United States Code, Sec 4704 (a)] and by which such possession "shall be deemed sufficient to authorize conviction unless defendant explains the possession to the satisfaction of the jury" (21 United States Code, Sec. 174). The jury was suffi-

QUESTIONS PRESENTED.

(1) Whether in a prosecution for purchasing a narcotic drug other than from the original stamped package and for receiving and concealing this drug knowing that it had been imported contrary to law, a defendant may be doubly punished from a jury finding of the single fact of possession of narcotics when by statute these two offenses may be presumed from that fact and the presumption applicable to one offense presumes the existence of a fact not essential to the other.

(2) Whether it is sufficient to instruct the jury in a two count narcotic prosecution in which the government relies on two statutory presumptions which flow from the single act of possession to merely find possession in defendants, or either of them, rather than the elements of the two crimes charged.

(3) Whether in a two count narcotic prosecution double punishment may be imposed when the court fails to instruct the jury to find the additional facts distinguishing the crime charged in one count from the crime charged in the other count and merely requires them to find the single fact of possession of narcotics.

STATUTES INVOLVED.

Section 2 (c) of the Narcotic Drugs Import and Export Act, 35 Stat. 614 (U. S. C., Title 21, Sec. 174), as amended by the act of Nov. 2, 1951, 65 Stat. 767, read as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitate the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported

contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years.

For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.[1]

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Section 4704 of the Internal Revenue Code of 1954 provided in part:

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Section 7237 of the Internal Revenue Code of 1954 provided in part:

(a) Violation of law relating to opium and coca leaves and marijuana.—Whoever commits an offense or conspires to commit an offense described in part I

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[1] By the Act of July 18, 1956, c. 629, Title I, §§ 103 and 105, 70 Stat. 568, 570, the maximum penalties were increased to twenty years for a first offender and to forty years for a second or subsequent offense both under this statute and under Section 7237 of the Internal Revenue Code of 1954.

or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years.

For a second offense the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. • • •

STATEMENT.

Petitioner was convicted with two others by a jury under a two count indictment which charged them (1) with purchasing 224 grains of the narcotic drug, heroin, other than in or from the original stamped package in violation of Section 4704 (a), Title 26, U. S. Code, and (2) with receiving and concealing the same heroin knowing that it had been imported contrary to law in violation of Section 174, Title 21, U. S. Code. The maximum sentence of five years imprisonment for a first offender was imposed on each count to run consecutively making an aggregate sentence of ten years.

The evidence on the jury trial showed that on February 8, 1956, two St. Louis police officers stood on a can and on a grating and looked through a gap between the shade and sill of two windows of a house, that one officer saw petitioner in the room (R. 66-72) and the other saw his two co-defendants, Gladys Stamps and Clarence Robinson (R. 27-32). Robinson had his hand in some white powder on the bed. The individuals in the room fled before the entry of the officers and left behind some powder on the mirror, some filled capsules, a box of empty capsules, an eyedropper with needles attached and a flour sifter. The powder on the mirror contained 42 grains of heroin and there were 169 capsules filled with heroin (R. 37, 73).

A narcotic agent testified that he talked to defendants Robinson and Stamps in the jail two months after the occurrence and each of them told him that all three defendants, including petitioner, had been in the room and that the heroin belonged to petitioner (R. 114-120).

At the trial petitioner and Stamps both testified that petitioner was not present in this room (R. 146). Stamps testified that the third person in the room was one Gola Mason (R. 125), who when called as a witness admitted he was present and that petitioner was not there (R. 153-154).

The trial court in its instructions read to the jury the provisions of Section 4704 (a) of Title 26 and Section 174 of Title 21, United States Code, including the provisions by which possession of unstamped narcotic drugs is made prima facie evidence of a violation of 26 U. S. C., § 4704 (a), and the provisions by which such possession shall be deemed sufficient to authorize conviction unless defendant explains the possession to the satisfaction of the jury under 21 U. S. C., § 174. The indictment was also read (R. 197-200).

The Court then instructed the jury (R. 200):

> "So the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug on the 8th day of February of this year, out there in the room at 4567 McMillan, identified here in evidence" (R. 200).

The trial court further charged as follows (R. 205-207):

> "So, if you find and believe from all the evidence beyond a reasonable doubt, that the defendants or either of them possessed the narcotics mentioned in Count 1, and that the said narcotics did not bear the required Internal Revenue tax stamps, then you will find the defendants or either of them guilty as charged in

Count 1. * * * Now, the law as provided for the offense charged in Count 2 of the indictment, the law provides that when on trial for receiving and concealing and facilitating the concealment of a narcotic drug, the defendants, or either of them, are shown to have had possession of such drug, such possession shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defendants, or either of them, explain their possession to your satisfaction. By explaining their possession to your satisfaction as used in the statute, is meant that if the defendants, or either of them, had possession of the narcotic drug they will have to explain that it came to them legally, and without the explanation you would be authorized to find the defendants, or either of them, guilty as to Count 2 of the indictment. The possession contemplated by the statutes which applies to Count 2 of the indictment need not be personal and exclusive. It need not be immediate. It is sufficient that the evidence shows the defendants, or either of them, to have had possession of the narcotic on February 8, 1956, at 4567 McMillan. The Court instructs the jury that unless you find that the defendants, or either of them, had possession of the narcotics mentioned in Counts 1 and 2 of the indictment, and unless you find and believe that such narcotics were under the dominion and control of the defendants, or either of them, at the time and place mentioned in the indictment, you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2."

The Court below affirmed the conviction and held that the single fact of possession justified two cumulative sentences. It rejected petitioners' argument that since the conviction on both counts rested upon statutory presumptions and not upon independent evidence, a cumulative

sentence based solely on the presumptions flowing from the single act constituted double punishment. The Court found that the instructions sufficiently and correctly instructed the jury of what it was necessary for them to find "from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment."

Petitioner's contention that no double punishment could be imposed in the absence of instructions requiring the jury to find the additional facts distinguishing the counts was answered with the statement that "the instructions fully and accurately covered the applicable provisions of the section of the statutes and clearly defined the conditions for conviction."

REASONS FOR GRANTING THE WRIT.

1. **Blockberger v. United States**, 284 U. S. 299, sets forth the rule that a defendant may be convicted of two separate offenses arising from a single act if each offense requires proof of a fact not essential to the other. This case goes further and in effect holds that a defendant may be convicted of two separate offenses and given double punishment from the proof of a single fact if two offenses may be presumed from that fact and the presumption applicable to one offense presumes the existence of a fact not essential to the other.

The single act of possession of narcotics does not violate any statute[2] but the different statutory presumptions which flow from this single act are deemed sufficient to establish the proof of a fact in one offense not essential to the other offense. Here petitioner was given the maximum sentence of imprisonment on each of two counts to run consecutively after the government proved a single fact,

[2] These statutory presumptions do not reduce the offense to one of mere possession. *Roviaro v. United States*, 353 U. S. 53.

the possession of narcotics, because 26 U. S. C., § 4704, and 21 U. S. C., § 174, establish two different presumptions which flow from this single act. 26 U. S. C., § 4704, makes it an offense to purchase a narcotic drug other than from the original stamped package and provides that the absence of tax paid stamps from narcotic drugs "shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." 21 U. S. C., § 174, inter alia, makes it an offense to receive and conceal a narcotic drug knowing that it has been imported contrary to law and provides that whenever "the defendant is shown to have or to have had possession of narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The court below in upholding petitioner's double punishment applied the following test:

> "A single act which violates two statutes is punishable under both, unless the offenses defined therein are identical. The test of identity is whether the same evidence will sustain both charges. If one of the offenses requires an element of proof which the other does not, a conviction of one does not bar prosecution for the other."

The error in the application of that test in this case is apparent. The Court below reduced the offenses charged to that of mere possession and then in effect held that the single act of possession of narcotics violates two statutes even though this single act does not violate any statute. Possession gives rise to two presumptions but these statutory presumptions do not reduce the offense to one of mere possession. Moreover, the two offenses here involved became identical when at the trial no evidence was introduced of any additional fact distinguishing them. The same evidence, possession, did in fact sustain both charges. While one of the offenses required an element of proof

which the other did not, that requirement was eliminated by the use of the two statutory presumptions.

The cases relied upon by the Court below do not answer the issue raised herein. We concede that the two sections involved create separate offenses. But when the issue is raised after a guilty plea, there has been an admission of all facts averred in the indictment and reliance on the presumptions is not involved.[3] And cases which have considered related issues in a motion to vacate under Section 2255 of Title 28[4] are limited to matters which may be raised by collateral attack. In other cases, additional facts distinguishing the offenses involved had been introduced in evidence.[5] The evidence, in the instant case, shows that the government rested its case on the two statutory presumptions and did not introduce any additional fact distinguishing the two offenses. The result of the decision of the Court below is to dispense with the different evidential requirements of the two statutes here involved and to make them the same.

Moreover, it may be that the Boggs Act which sets forth the penalties applicable in this case would forbid the imposition of cumulative sentence.

> "The purpose of the bill (The Boggs Act) is to make more stringent **and more uniform** the penalties which would be imposed upon persons violating the Federal narcotic and marijuana laws." (Emphasis ours.) S. Rep. No. 1051, 82d Cong., 1st Sess., Oct. 1, 1951, 2 U. S. Code. Cong. Serv. 2602 (1951).

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[3] E. g. *United States v. Brown*, 7 Cir., 207 F. (2d) 310; *Torres Martinez v. United States*, 1 Cir., 220 F. (2d) 740.

[4] E. g. *Gore v. United States*, D. C. Cir., 224 F. (2d) 763; *United States v. Brisbane*, 3 Cir., 239 F. (2d) 859.

[5] E. g. *Sorrentino v. United States*, 9 Cir., 163 F. (2d) 627; *Bruno v. United States*, 9 Cir., 164 F. (2d) 693; *Copperthwaite v. United States*, 6 Cir., 37 F. (2d) 846.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957

No. 11

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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meaning of the sections of the statute on which the indictment was rested. It is fairly inferable from the picture presented by the evidence and the jury could well have concluded that defendants gathered in the room about their pile of heroin with the filled and unfilled capsules and paraphernalia for filling capsules and taking heroin, were engaged, as the government claimed, "in what is called in the vernacular of the business, 'capping up' heroin." The jury was not obliged to credit the evidence offered by Harris to establish an alibi.

2. Appellant contends the court erred in permitting the government witness Theisen to testify to hearsay statements made to him by the codefendants Gladys Stamps and Clarence Robinson. Theisen's testimony was that both Gladys Stamps and Clarence Robinson told him at the jail, nearly two months after the occurrence in question, that Harris was the owner of the heroin that was seized and was present in the room when and where the defendants had it. It is not seriously disputed that viewed from certain angles that testimony was hearsay. As to defendants Gladys Stamps and Clarence Robinson it was not hearsay but constituted a confession of guilt on their part and a description of their crime that was plainly admissible against each of them. The position of Gladys Stamps was different from that of Robinson because Gladys Stamps became a witness for Harris on the trial and gave testimony in support of his alibi. She swore that Harris was not in the room with her and Robinson or in possession of the heroin. Her contradictory statements to Theisen that Harris was in the room with her and Robinson, that the heroin belonged to Harris, and that he was the person from whom she (a confirmed narcotic addict) "copped" were also plainly admissible against her. Robinson did not take the witness stand.

Appellant Harris did not raise the objection on the trial that the statements Gladys Stamps and Robinson

ciently and correctly instructed of what it was necessary for them to find from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment.

4. Under his fourth point the appellant contends that the court erred in imposing cumulative sentences in respect to the two counts.

The record shows that on the return of the verdict in this case finding the defendant guilty on each of the two counts of the indictment, the court prescribed imprisonment for a period of five years as to and under the charge contained in count one and for a period of five years as to and under the charge contained in count two, the second term to run consecutively with the term imposed under count one. The court also declared concerning the two prescribed periods of imprisonment that they made "an aggregate term of imprisonment imposed herein upon defendant Harris of ten years."

This appeal was submitted at the May term in this year and on that submission a mistake was made as to the maximum penalty prescribed for the offense alleged in the second count and denounced in Title 21, United States Code, Sec. 174. Title 21, United States Code, Sec. 174, shows the maximum imprisonment for violation of that section to be ten years but the offense was committed as stated on February 8, 1956, and by amendment the maximum period of imprisonment made applicable for first offense under the section committed at that time is five years.

Accordingly on the submission of the case at the May term, the court did not find it necessary to pass upon appellant's contention that the trial court erred in imposing cumulative sentences of five years upon each of the two counts in the indictment to run consecutively. The sen-

tence to ten years imprisonment was considered as an aggregate sentence as declared by the trial court and as such was within the statutory maximum. When the amendment of the statute was called to our attention a rehearing was had and the question as to the periods of imprisonment imposed upon appellant was again presented and has been reconsidered.

The argument for appellant is in substance that the evidence showed only the single fact against him, that he had possession of the heroin, and nothing more and even if that fact was "prima facie evidence of a violation" and "authorized conviction * * * unless" [explained] the single fact could not justify two cumulative sentences.

If the question thus presented was of first impression it might be conceded that more than one answer would be possible, but the same question has often been considered by the federal courts and it is settled by unanimous and uniform decisions that separate and consecutive sentences for violation of the statutes here involved or their predecessors may be imposed, notwithstanding each offense arose from one common transaction. The latest case is **Gore v. United States,** 244 F. 2d 763, which was decided by the court of appeals of the District of Columbia April 25, 1957, after the judgment herein was rendered on April 27, 1956.

In that case the defendant had been indicted in six counts respecting two sales of narcotics in violation of Title 21, United States Code, Sec. 174 and Title 26, United States Code, Sec. 4704 (a) and Sec. 4705 (a) and after trial and conviction he had been sentenced to fine and imprisonment for from one to five years on each of the first three counts, the sentences to run consecutively. Similar sentences were imposed upon the last three counts to run concurrently with the first. Defendant subsequently moved

for vacation or modification of the sentences under Title 28, United States Code, Sec. 2255 and his motion was denied. On the appeal taken from the denial the court of appeals of the District of Columbia reviewed the decisions on the question of cumulative sentences under the narcotic acts in its own and other circuits. It quoted from **Kendrick v. United States**, 99 U. S. App. D. C. 173, 238 F. 2d 34 (1956) as follows:

> "A single act which violates two statutes is punishable under both, unless the offenses defined therein are identical. The test of identity is whether the same evidence will sustain both charges. If one of the offenses requires an element of proof which the other does not, a conviction of one does not bar prosecution for the other." Id., 238 F. 2d at page 36.

and declared:

> "When Congress enacted 26 U. S. C. §§ 4704 (a) and 4705 (a), and 21 U. S. C. A. § 174, it created three separate offenses. Each involves a different facet of the narcotics trade and each has different evidentiary requirements. This court and courts of a number of the other circuits, including the First, Fifth, Sixth, Seventh, Eighth and Ninth, have approved convictions and separate and consecutive sentences for violation of the same statutes involved here, or their predecessors, where each offense arose from one common transaction. And, as recently as January 2, 1956, the Third Circuit, in a well reasoned opinion by Judge Maris, in **United States v. Brisbane**, 239 F. 2d 859, a case identical to the present one, reached the same conclusion." 244 F. 2d 763, 765.

The decision in the Gore case is in accord with the decision of this court in **McIntosh v. White**, 21 F. 2d 934 (1927) and we are in accord with the Gore decision as presenting the law applicable to the question here involved brought

up to the present. The imposition of separate and cumulative sentences herein of five years under each of the two counts of the indictment was not erroneous.

Appellant has also argued that the instructions to the jury were erroneous in that the court did not require the jury to find specifically that defendant had done the acts charged in the two counts of the indictment in order to convict, but the instructions fully and accurately covered the applicable provisions of the sections of the statutes and clearly defined the conditions for conviction. They were not excepted to and were without error.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,573 September Term, 1957.

Wednesday, October 2, 1957.

Nathaniel Harris,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the District Court, Nathaniel Harris, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

October 2, 1957.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 591.

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

1. In **Prince v. United States**, 352 U. S. 322, this Court set forth its policy "of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history." The Government has not demonstrated any intent upon the part of Congress to fragmentate the two statutes here involved. Rather, it is more likely that Congress by these sections only intended to facilitate the conviction of persons in each stage of the illegal drug trade.

The Government's attempt to find independent evidence to support two offenses is fallacious. It argues:

> "Actually, in this case there was adequate proof of separate acts. The defendants were in actual receipt and in the process of concealing the heroin in violation of 21 U. S. C. 174, when they were apprehended. The nature of their activities was such as to indicate that they knew it had been imported contrary to law. In view of the absence of stamps, there was also justification for concluding that an illegal act of purchase, separate from the receipt and concealment, had occurred."

This endeavor to find proof of separate acts illustrates that the two offenses charged were actually merged in the instant case. The statement that defendants were in actual receipt is equivalent to saying defendants were in possession since possession implies receipt. There is nothing in the evidence to indicate when and where the narcotic drug was received. The argument that defendants were in the process of concealing the heroin is merely a statement that in any possession there is some concealment from others. The contention that the nature of their activities indicated that they knew the drug had been imported contrary to law means no more than that intent, knowledge or state of mind is generally shown from all the circumstances in the evidence. The argument that the absence of stamps was justification for concluding that an illegal act of purchase had occurred is equivalent to inferring an illegal purchase from the possession of the drug. It is significant that the Court below did not attempt to find proof of separate acts.

In **Blockberger v. United States**, 284 U. S. 299, this Court approved consecutive sentences on counts which charged a sale of narcotics not from the original stamped package and not in pursuance of a written order of the

purchaser. There was no merger of the two offenses in the evidence which showed an omission to comply with the different requirements of two statutes in the single sale. It was also possible for a sale to comply with the requirements of one statute alone and yet be in violation of the other statute. But, under the statutes involved in the instant case, every person charged with purchasing narcotic drugs other than from the original stamped package may always be found guilty of receiving and concealing the drug knowing that it had been imported contrary to law. The government makes a prima facie case under both sections by merely showing possession. The intent of Congress to facilitate the conviction of persons involved in each stage of the illegal drug traffic is made a means of double punishment. This case goes further than **Gore v. United States**, D. C. Cir., 244 F. (2d) 763, because that case is limited to matters which may be raised by collateral attack.

2. The instructions of the trial court merged the two offenses and this merger eliminated the right to impose consecutive sentences whether or not petitioner excepted to the charge. It is equivalent to a Court's requirement that the Government elect which of two counts it intends to present to the jury and the Government should have objected if it wished to keep the possibility of consecutive sentences alive. We concede that, if the sentences had been concurrent, petitioner may have waived his right to complain in this regard by failing to except to the charge. But, the imposition of consecutive sentences made either the merger or the sentence fundamental error since under those circumstances, the finding of an additional fact distinguishing the counts was the most essential ingredient which should have been submitted to the jury.

The other errors in the charge are adequately covered in the petition. They were fundamental in that the jury was not submitted the essential ingredients of the offenses

charged. These instructions are subject to review in the absence of exception. **Screws v. United States**, 325 U. S. 91. Furthermore, the court below reviewed the errors here urged.

CONCLUSION.

For the reasons set out above and those set out in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT, U.S.

OCT 15 1958

JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 11.

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 11.

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (R. 124-131) is reported at 248 F. 2d 196.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 2, 1957 (R. 132). The petition for a writ of certiorari was filed on October 31, 1957, and was granted on June 30, 1958 (R. 133). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

(1) Whether, in a prosecution for purchasing a narcotic drug other than from the original stamped package and for receiving and concealing this drug knowing that it had been imported contrary to law, consecutive sentences could validly be imposed on a jury finding of the single fact of possession of narcotics or on a court's charge which failed to require findings as to the necessary elements to constitute these two separate charges.

(2) Whether, in a narcotic prosecution involving three defendants in which the government relies on statutory presumptions which flow from the single fact of possession, it is sufficient to instruct the jury to merely find possession in defendants, or either of them.

STATUTES INVOLVED.

The Narcotic Drugs Import and Export Act, Sec. (2) (b) and (2) (d), 43 Stat. 657 (21 U. S. C. 173):

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.
>
> Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Section 2 (c) of the Narcotic Drugs Import and Export Act, 65 Stat. 767 (21 U. S. C. 174), provides as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitate the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.
>
> Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The Internal Revenue Code of 1954, Sections 4701, 4703, 4704 (a), 7237 (a), 68A Stat. 549-550, as amended 69 Stat. 3. (26 U. S. C. Supp. III, 4701, 4703, 4704 (a), 7237 (a):

Section 4701. Imposition of tax.

> (a) **Rate.**—There shall be imposed an internal revenue tax upon narcotic drugs, produced in or imported into the United States, and sold, or removed for consumption or sale, at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall

be in addition to any import duty imposed on narcotic drugs.

(b) **By whom paid.**—The tax imposed by subsection (a) shall be paid by the importer, manufacturer, producer, or compounder (Aug. 16, 1954, c. 736, 68A Stat. 549.)

Section 4703. Affixing of Stamps.

The stamps provided in section 4771 (a) (1) shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof. (Aug. 16, 1954, c. 736, 68 A Stat. 550.)

Section 4704. Packages.

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Section 7237. Violation of laws relating to Narcotic Drugs and to Marijuana.

(a) Violation of law relating to opium and coca leaves and marijuana.—Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 years or more than 5 years.

For a second offense offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. * * *

STATEMENT.

In a two-count indictment returned on February 17, 1956, in the United States District Court for the Eastern District of Missouri, petitioner, Gladys Stamps, and Clarence Robinson were charged with (1) unlawfully purchasing from an unknown person on February 8, 1956, 224 grains of heroin other than in or from the original stamp package in violation of 26 U. S. C. 4704 (a); and (2) receiving and concealing and facilitating the concealment of this heroin on the same date, knowing that it had been imported contrary to law, in violation of 21 U. S. C. 174 (R. 1-2). The jury found all three defendants guilty on both counts (R. 121). Petitioner was given consecutive sentences of five years imprisonment and a one-dollar fine on each count, making an aggregate sentence of ten years imprisonment and a two-dollar fine (R. 122-123). This was the maximum sentence of imprisonment permissible under the statutes for a first offender. On appeal petitioner's conviction was affirmed (R. 124-131).

Evidence adduced at the trial by the Government may be summarized as follows:

On February 8, 1956, at about 2:00 A. M., two St. Louis police officers, named Robinson and Foxworth, looked into separate windows on the ground floor of an apartment at 4567 McMillan Avenue, one officer standing on a can and the other on a grating and both peering through a gap between the shade and sill of the windows (R. 14, 39). Officer Robinson saw defendant Stamps standing alongside defendant Robinson, who was seated next to a bed on which there was white powder on a mirror (R. 15). Defendant Robinson had his hands in this powder (R. 34). Officer Foxworth saw petitioner looking at something he was holding in his left hand and over which he made a motion with his right hand (R. 39-40). When the officers went to the door

of the apartment and announced from the hallway that they were police officers the individuals in the room fled presumably through a window (R. 17, 41). The officers recovered the powder on the mirror, some filled capsules, a box of empty capsules, two syringes with needles attached and a flour sifter. Some capsules were taken from a lady's coat found in the room (R. 18-23, 42-44). The officers turned this evidence over to the Federal Narcotics authorities (R. 24, 67-69). It was shown that about 221 grains of heroin, including 169 or 174 filled capsules were seized (R. 5-6). The heroin and paraphernalia were identified in evidence as Exhibits 1, 2 and 3 (R. 4-6, 20).

Petitioner's defense was an alibi. Petitioner and Stamps both testified that he was not present in the room at 4567 McMillan on the night of the raid (R. 76-77, 86-88). Miss Stamps and Gola Mason testified that Mason (not petitioner) was the person present in the room with her and Robinson on that night (R. 76, 94-95).

In the charge to the jury the trial judge read the pertinent provisions of 26 U. S. C. 4704 (a) and 21 U. S. C. 174, including the provisions by which possession of unstamped narcotic drugs is made prima facie evidence of a violation of 26 U. S. C. 4704 (a), and the provisions by which such possession shall be deemed sufficient to authorize conviction unless defendant explains possession to the satisfaction of the jury under 21 U. S. C. 174, and the two counts charged under those sections (R. 105-107). Continuing, immediately thereafter, the court instructed (R. 107):

> "So the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug on the 8th day of February of this year, out there in the room at 4567 McMillan, identified here in evidence."

The court then defined "unlawfully," as used in the indictment, to mean "without legal justification or without

authority of law" (R. 108). The court further charged as follows (R. 110-112):

"Now, under the law as provided for the offense charged in Count 1 of the indictment, for the unlawful purchase of a narcotic drug, the absence of appropriate tax paid stamps from the narcotic drugs in one's possession shall be prima facie evidence of a violation of the law on which Count 1 is based, as I read it to you, by the person whose possession of such drugs may be found.

"So, if you find and believe from all the evidence beyond a reasonable doubt, that the defendants or either of them possessed the narcotics mentioned in Count 1, and that the said narcotics did not bear the required Internal Revenue tax stamps, then you will find the defendants or either of them guilty as charged in Count 1. Unless you so find, you will find the defendants, and each of them, not guilty.

"Now, under the law as provided for the offense charged in Count 2 of the indictment, the law provides that when on trial for receiving and concealing and facilitating the concealment of a narcotic drug, the defendants, or either of them, are shown to have had possession of such drug, such possession shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defendants, or either of them, explain their possession to your satisfaction. By explaining their possession to your satisfaction as used in the statute, is meant that if the defendants or either of them, had possession of the narcotic drug they will have to explain that it came to them legally, and without the explanation you would be authorized to find the defendants, or either of them, guilty as to Count 2 of the indictment. The possession contemplated by the statute which applies to Count 2 of the indictment need not be personal and exclusive. It need not be immediate. It is sufficient

that the evidence shows the defendants, or either of them, to have had possession of the narcotic on February 8, 1956, at 4567 McMillan.

"The court instructs the jury that unless you find that the defendants, or either of them, had possession of the narcotics mentioned in Counts 1 and 2 of the indictment, and unless you find and believe that such narcotics were under the dominion and control of the defendants, or either of them, at the time and place mentioned in the indictment, you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2.

"The court further instructs the jury that a person has possession of a thing or object who has physical control of the thing or object with the intent to exercise such control, or having had such control, has not abandoned it and no other person obtained possession."

The Court below affirmed the conviction and held that the single fact of possession justified two cumulative sentences. It rejected petitioners' argument that since the conviction on both counts rested upon statutory presumptions and not upon independent evidence, a cumulative sentence based solely on the presumptions flowing from the single act constituted double punishment (R. 128-130). The Court found that the instructions sufficiently and correctly instructed the jury of what it was necessary for them to find "from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment" (R. 128). Petitioner's contention that no double punishment could be imposed in the absence of instructions requiring the jury to find the additional facts distinguishing the counts was answered with the statement that "the instructions fully and accurately covered the applicable provisions of the section of the statutes and clearly defined the conditions for conviction" (R. 131).

SUMMARY OF ARGUMENT.

1. Separate statutory provisions make it an offense to purchase narcotic drugs from an unstamped package and a crime to receive and conceal such drugs with knowledge of illegal import. Both statutes have presumptions which place upon a person found in possession the burden of going forward with his defense. Petitioner and two others, charged in a two count indictment with violating both statutes, were seen in a room in which heroin was found immediately after their departure. At the trial, after reading the indictment and the statutes under which defendants were charged, the court instructed that "the question under each count . . . resolves down to whether or not the defendants, or either of them, did possess this narcotic drug . . ." The jury, in finding petitioner guilty under both counts of the indictment, thus found the single act of possession of narcotics. The maximum sentence of imprisonment was imposed on each count to run consecutively.

The action of the trial judge in reducing the issue under each count to possession constituted a merger of offenses which eliminated any power to impose cumulative sentences and the jury finding of the single fact of possession of heroin coupled with the statutory presumptions which placed upon petitioner, on proof of possession, the burden of going forward with his defense will not support such double punishment.

The decision in **Gore v. United States**, 357 U. S. 386, permits the imposition of consecutive sentences on a seller of narcotics for violation of three different provisions relating to the drug. A legislative intent to multiple punishment was found to be discernible. Perhaps, Congress did not intend to make consecutive sentences applicable to possession of heroin. The unlawful import act in 1909

was the initial step of Congress to control narcotics while the enactment of stamped package offense in 1919 had as one of its purposes making "criminally liable, any person having in his possession any amount of the habit-forming drug."

But, even under the assumption that **Gore** foreclosed the issue of separate offenses and that the crimes charged are two as a matter of statutory construction, double punishment may only be imposed if certain fundamental procedure is followed. The grand jury and prosecutor must choose to charge in separate indictment counts and the separate charges must not be abandoned at the trial. The evidence must show two separate violations and the instructions must require findings of different crimes.

Under the same evidence test followed in **Blockburger v. United States**, 284 U. S. 299, the test to be applied to determine whether there are two offenses or one is whether each statutory provision "requires proof of an additional fact which the other does not." Because of the presumptions, each statute here involved merely requires proof of possession. At the trial, the two offenses became unitary when no evidence was introduced of any additional fact which would distinguish them. In any event, the instructions did not require the finding of an additional fact in one count which the other did not contain and the gist of the jury verdict was possession in each count.

Where, under the evidence, one crime is necessarily incidental and included in another, cumulative punishment has been disallowed under a doctrine sometimes called merger of offences. For example, possession and transportation of intoxicating liquor might constitute two offenses but if the evidence only shows a possession necessarily incidental to the transportation, the punishment may only be single. If possession of contraband is a necessary and incidental part of its transportation under evidence which

fails to disclose a possession apart from transportation, possession in one count, in this case, is likewise inseparable from a possession in another count. In the area of multiple punishment, any ambiguity should be resolved in favor of lenity.

A single finding of possession may not be the basis of a double punishment without violating the Double Jeopardy Clause.

2. The instructions were insufficient in not requiring the jury to find the elements of the crime or crimes charged. Moreover, the court permitted a conviction of petitioner if any of his co-defendants had possession of the narcotics and, since petitioner's defense was an alibi, the jury may have convicted him even if it believed all of his evidence.

ARGUMENT.

I.

A jury finding of the single fact of possession of heroin coupled with statutory presumptions which placed upon petitioner, on proof of possession, the burden of going forward with his defense will not support consecutive sentences under charges of (1) purchasing heroin from an unstamped package, and (2) receiving and concealing the heroin knowing that it had been imported contrary to law.

In **Gore v. United States**, 357 U. S. 386, the defendant was found guilty and consecutive sentences were imposed under counts charging (1) a sale of narcotics not in pursuance of a written order, (2) the purchase, sale, dispensing, and distribution of these drugs from an unstamped package, and (3) facilitating the concealment and sale of the same drugs with knowledge of unlawful import. Gore moved to vacate the sentence contending that consecutive sentences could not properly be imposed under such an indictment and that **Blockburger v. United States**, 284 U. S. 299, should be overruled as not being in accord with legislative history. This Court rejected his contentions, holding that Congress was not merely giving different labels to the same thing, that the counts were not simply different descriptions of the same offense and that the disregarding of different restrictions in the course of one transaction could constitute multiple offenses which might be punished cumulatively. This Court also found that the constitutional prohibition against double jeopardy was not offended by punishment for each of the separate offenses for which Gore had been sentenced and that the charges were not merely different descriptions of the same offense.

The **Gore** and **Blockburger** cases involved crimes of the peddlers or traffickers while the instant case involves

crimes of the possessors. The Gore case also contains a charge of different acts in each count in connection with different Congressional restrictions. Count one charged merely a sale, count two charged purchase, sale, dispensing and distribution, and count three alleged facilitating the concealment and sale. Narrowly, the allegation of sale in counts two and three might be considered to be surplusage.

But the issues involved in this case do not merely rest on narrow distinctions. No issue touching the conviction was before this Court in **Gore**. It is petitioner's contention that the prosecution proved only the single fact of possession of heroin, and that under such proof, it was error to impose cumulative sentences on each count. Even if the proof showed more than possession, the jury only found possession of heroin under the instructions. The action of the trial judge, in its instructions, in equating the charge under both counts with mere possession constituted a merger which eliminated any power to impose consecutive sentences. An examination of the statutory presumptions, proof and instructions is accordingly necessary.

The two-count indictment charged petitioner and two others with (1) purchasing heroin other than in or from the original stamped package and (2) receiving and concealing this heroin knowing that it had been imported contrary to law. Section 4704 of the Internal Revenue Code of 1954, insofar as here pertinent, makes it an offense to purchase a narcotic drug other than from the original stamped package and provides that the absence of tax paid stamps from narcotic drugs "shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." Section 174 of Title 21 makes it an offense to receive, conceal or purchase a narcotic drug knowing that it has been imported contrary to law, and provides that whenever "the defendant is shown to have or to have had possession of the narcotic drug such

possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The two statutory presumptions "are not evidence in a proper sense, but simply regulations of the burden of proof." **Casey v. United States**, 276 U. S. 413, 418. The presumptions place the burden upon the party found in possession to explain and justify it when accused of the crimes that the statutes create on the theory that it is his burden to prove facts peculiarly within his knowledge and hidden from discovery by the government. But these presumptions do not reduce the crime to one of mere possession or shift the burden of proof. They merely place upon the accused, at a certain point, the burden of going forward with his defense. **Roviaro v. United States**, 353 U. S. 53, 63. See also **Morrison v. California**, 291 U. S. 82, 88.

Possession of narcotics could elicit counts of (1) purchase of narcotics from an unstamped package; (2) buying illegally imported narcotics; (3) receiving illegally imported narcotics; (4) concealing illegally imported narcotics, and (5) facilitating the transportation of illegally imported narcotics.[1] Indeed, the wording of the presumption statutes is broad enough to encompass additional counts of sales and dispensing on evidence of mere possession such as (1) selling narcotics from an unstamped package; (2) dispensing narcotics from an unstamped package; (3) sale of narcotics without a written order form and (4) selling illegally imported narcotics.[2] But such a con-

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[1] *Martinez v. United States*, 1 Cir., 220 F. 2d 740.

[2] The government regularly obtains multiple convictions aided by the statutory presumption that possession evidenced multiple violations. See Statement of Assistant Attorney General Warren Olney, III, in Hearings Before the Subcommittee on Traffic in, and Control of Narcotics of the House Committee on Ways and Means, 84th Cong., 2d Sess. 1195 (1956): "Because of the various presumptions of guilt arising from the possession of narcotics in

struction holding proof of possession sufficient to authorize convictions for sales and dispensing would probably be invalid as not constituting a rational connection between the fact proved and the ultimate fact presumed.[3]

The government rested its case on the two statutory presumptions and evidence of possession. The view of the trial judge that possession alone was proved is apparent from the instructions. The court below, in rejecting petitioner's argument that the single fact of heroin would not justify cumulative sentences, tacitly adopted this interpretation in concluding that a single act which violates two statutes is punishable under both (R. 129-130). The evidence showed that the police, peering through the windows, saw petitioner in a room with two other persons, that all the occupants fled upon learning of the arrival of the police and that heroin, two syringes with needles attached and a flour sifter were found in the room. It is only in this court that the government has attempted to find evidence other than possession to support a two-count conviction, saying (Brief for the United States in Opposition, p. 9):

> "Actually, in this case there was adequate proof of separate acts. The defendants were in actual receipt and in the process of concealing the heroin in violation of 21 U. S. C. 174, when they were apprehended. The nature of their activities was such as to indicate that they knew it had been imported contrary to law. In view of the absence of stamps, there was also justification for concluding that an illegal act of purchase, separate from the receipt and concealment, has occurred."

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several of the narcotic statutes the prosecution of narcotic violators once they have been apprehended actually presents no great problem. As a matter of fact it is our opinion that narcotic violators are frequently convicted on evidence that would not suffice in most other types of cases."

[3] *Tot v. United States*, 319 U. S. 463.

This endeavor to find proof of separate acts illustrates that the two offenses charged were actually merged in the evidence. One offense was necessarily included and incidental to the other. The statement that defendants were in actual receipt is equivalent to saying defendants were in possession since possession implies receipt. There is nothing in the evidence to indicate when and where the narcotic drug was received nor how long it was possessed. The argument that defendants were in the process of concealing the heroin is merely a statement that any possession includes concealment from others. The contention that the nature of their activities indicated that they knew the drug had been imported contrary to law means no more than saying that intent, knowledge or state of mind is generally shown from all the circumstances in the evidence. The argument that the absence of stamps was justification for concluding that an illegal act of purchase had occurred is equivalent to inferring an illegal purchase from the possession of the drug. The result of its position is that two offenses may be inferred from the single fact of possession and that two offenses are necessarily included and incidental to the act of possession unless a jury chooses to accept a defense explanation as to one count and to reject it on the other count. And this doctrine may be extended to the total of from five to nine counts which may be presumed from possession.

Moreover, it is immaterial whether or not there was evidence apart from possession to sustain multiple violations. A reading of the trial judge's charge makes it evident that the jury found only the single fact of possession.

After reading to the jury the statutes and indictment under which petitioner was charged (R. 105-107), including the presumptions, the court immediately thereafter instructed that "the question under each count * * * resolves down to whether or not the defendants, or either of them, did possess this narcotic drug on the 8th day of

February of this year, out there in the room at 4567 McMillan * * *'' (R. 107). The trial judge then reiterated that if the jury found defendants in possession that "you will find the defendants'' guilty under count 1 (R. 110-111). This clearly told the jury that if they found possession that they must find the defendants guilty. The court further told the jury that if they found defendants had possession and did not explain that possession came to them legally "you would be authorized'' to find the defendants guilty under count 2 (R. 111). No defendant offered any evidence nor was there any evidence in the record to show that possession came to defendants legally. Therefore this instruction in effect told the jury that if they found possession, they were authorized to find the defendants guilty. It would have been inconsistent for the jury to have found defendants guilty under the first count without also finding them guilty under the second count. The court then concluded its factual instructions by informing the jury that unless you find the defendants had possession "you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2 (R. 111). The next portion of the charge was a definition of possession (R. 111-112).

The instructions as a whole obscured any difference that might exist in the two charges. While the court read both statutes and both counts to the jury, the effect of this part of the charge was completely nullified when the court concluded it by saying that the question under each count resolves down to whether or not defendants did possess this narcotic drug (R. 105-107). By so reducing the question to mere possession, the trial court eliminated any requirement that the jury find any separate elements contained in either count. It may be noted that the court in charging the jury on intent told them that it was not enough to find the defendants did "the acts complained of'' but that the jury must find that the acts were intentionally done (R. 108). However, it would be guessing to conclude

that the jury would understand these remarks in the intent portion of the instructions to mean they should therefore find the elements of each charge and not just possession. The charge also stated that it was the position of the government that petitioner purchased the narcotics under count one and received and concealed them under count two. But the charge also pointed out the petitioner's position that he was not present "at the time and place of the commission of the offense charged in the indictment" and that the jury should acquit if they had a doubt that petitioner was present "at the time and place of the commission of the offence charged in the indictment" (R. 110). It was at this point that the court told the jury that if they found possession they will convict under count one and they would be authorized to convict under count two (R. 110-111).

In **Bollenbach v. United States**, 326 U. S. 607, petitioner was convicted of conspiracy to transport securities in interstate commerce. There were three different and conflicting theories regarding a charge whose function was to guide the jury in determining guilt. An erroneous instruction was given that possession of stolen property in another state than in which it was stolen raises a presumption that the possessor was the thief and transported stolen property in interstate commerce but that such presumption was subject to explanation. The court recognizing that "legal presumptions involve subtle conceptions to which not even judges always bring clear understanding" reversed on the ground that a conviction ought not to rest on an equivocal direction to the jury on a basic issue. If the instant charge is equivocal as to whether the jury merely found possession, such doubts should be resolved in favor of the defendant. A cumulative sentence should not rest on an equivocal charge on a major question.

It is apparent that the trial judge considered possession to be the gist of both charges and directed a verdict of

guilty on the mere finding of possession. The jury verdict was thus a finding of possession under both counts on the only question submitted to it.

There are certain fundamental principles which must be followed in any criminal case. The accused must be prosecuted by indictment or information and the grand jury and the prosecutor must decide whether to proceed in single or multiple counts. If they choose single counts, the defendant may not be punished for a single offense even if by duplicity multiple charges are alleged. In any multiple count accusation, the prosecutor may elect to proceed on only part of the counts. But, in order to impose consecutive punishment, at least two counts must be charged, the evidence must show multiple violations and the instructions must require findings of different crimes.

The problem of multiple sentences may be a perplexing one[4] but it would seem that whatever test is applied to determine whether cumulative sentences may be imposed, petitioner should not be doubly punished under the evidence in this case, the jury's finding and the court's instructions.

The most common rule applied in the lower federal courts is the same evidence test whose leading precedent is **Blockburger v. United States**, 284 U. S. 299, 304:

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. Gavieres v. United States, 220 U. S. 338, 342, 52 L. Ed. 489, 490, 31 S. Ct. 421, and authorities cited. In that case this

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[4] Note, Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties, 67 Yale L. J. 916.

> Court quoted from and adopted the language of the Supreme Court of Massachusetts in Morey v. Com., 108 Mass. 433: 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' * * *"

Under a superficial examination, the elements necessary under count one are that (1) defendants purchased the drug and (2) the drug was from an unstamped package and the required incidents under count two are that (1) defendant received the drug, (2) the drug so possessed had been unlawfully imported and (3) defendant had knowledge of the illegal importation. But such an examination would be an artificial one because it does not take into account the fact that the very statute itself which defined the crime also facilitated its proof by creating the presumptions. Congress itself has said through these presumptions that evidence, possession, which sustains one conviction sustains the other. And the test "is whether each provision requires proof of an additional fact which the other does not." Each statute does not require proof of an additional fact which the other does not. Each statute only requires proof of possession.[5] Thus the evidence which would sustain a conviction on the first count would also prove the second count. It would also be sufficient to

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[5] A statement of the proof necessary is found in *Roviaro v. United States*, 353 U. S. 53, 71 (dissenting opinion):

> "I come now to the necessary proof required for a finding of guilt under count 2. All that is necessary here is proof of possession of unstamped narcotics, such as heroin. The direct, uncontroverted evidence of possession, as well as transportation, is in the record. * * * Under the Narcotic Drugs Act, 65 Stat. 767, 21 U. S. C., § 174, 21 U. S. C. A., § 174, this alone is prima facie evidence of guilt. Petitioner did not rebut it. * * *"

See also *Velasquez v. United States*, 10 Cir., 244 F. 2d 416.

sustain additional counts charging (1) the buying of illegally imported narcotics and (2) facilitating the transportation of illegally imported narcotics. Count 2 could also have been split into separate counts charging receipt and concealment. Significantly at the trial, the same evidence, possession, did in fact sustain both charges and the jury, under the court's instructions solely, found possession.

There would be little practical difference if Congress had said that possession was a crime and hade made it a defense to a prosecution for possession of narcotics if the accused shows the narcotics are from a stamped package or that the drugs are legally imported. Indeed Congress intended to facilitate the conviction of the possessor when it enacted the stamp tax.

The 1909 import statute (35 Stat. 614) was the original act aimed at suppressing narcotic drugs. It was followed by the 1914 Harrison Narcotic Act (38 Stat. 785) which made it an offense to sell without order forms and also made unlawful possession by an unregistered person. By the Act of February 24, 1919 (40 Stat. 1130), Congress provided for a stamp tax and made unlawful the purchase, sale, dispensing, or distributing of the narcotic drugs unless in or from the stamped package. The occasion for the additional tax was the decision in **United States v. Jin Fuey Moy**, 241 U. S. 394, which eliminated the effectiveness of the 1914 Harrison Act by holding that Section 8, punishing the possession of narcotics by "any person not registered," did not apply to any person who was not in the class required to register. The congressional report said that "under that decision it was impossible to hold criminally liable a person having in his possession any amount of the habit-forming drug * * * unless such person is a dealer therein. The proposed bill, § 108, amends that Act so as to place an internal revenue tax, payable by stamp, on such drugs and provides that possession of an

unstamped package shall be prima facie evidence of a violation of that Act." H. Rep. No. 767, 65th Cong., 2d Sess., September 3, 1918, 1939-1 Cum. Bull. (Pt. 2) 113.

Realistically Congress meant to make possession an offense. These statutes were enacted under the commerce and revenue powers presumably to avoid constitutional objection. See 43 Cong. Rec. 1396-1400 (1909). And the Harrison Act barely survived constitutional test.[6]

The congressional explanation of the differentiation in penalties under the Narcotic Control Act of 1956 (70 Stat. 569) is not without significance. In H. Rep. No. 2388, 84th Cong., 2d Sess., p. 2, the offense against the narcotic drug import and export act is discussed as an offense of the "trafficker" while the stamped package offense is treated as that of the "possessor." Each offense in the instant case serves the same purpose and is the same in character. Both are offenses of the "possessor." Any other conclusion would always make the possessor a trafficker.

In any event, the instructions did not require the finding of additional fact in one count which the other did not have. In the absence of such a finding, cumulative sentences should not have been imposed. The jury was merely told to convict if they found possession of heroin in accordance with the statutory presumptions. But the jury was not specifically required to find any elements distinguishing the two offenses charged. Rather did the Court permit this finding of the sole element of possession to be the basis for a guilty verdict on both counts

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[6] *United States v. Doremus*, 249 U. S. 86; *Alston v. United States*, 274 U. S. 289; *Nigro v. United States*, 276 U. S. 332. The constitutionality of the narcotic statutes could most likely be sustained without reference to their revenue features in view of the expanded scope of the commerce clause, see *United States v. Darby*, 312 U. S. 100, 114, and because the narcotic laws are part of the scheme implementing treaty commitments of the United States, see H. R. Rep. No. 23, 63d Cong., 1st Sess. 2 (1913); *Alston v. United States*, 274 U. S. 289; Cf. *Missouri v. Holland*, 252 U. S. 416.

of the indictment. Even assuming that an instruction which rests on a presumption may be legally sufficient if it requires the jury to merely find the presumption, yet the failure to require the finding of an additional fact where both counts rest on substantially similar presumptions reduces the test in the **Blockberger** case to a mere formal one. The instructions merged the two counts and this merger eliminated the right to impose consecutive sentences. It is equivalent to a Court's requirement that the government elect which of two counts it intends to present to the jury and the government should have objected if it wished to keep the possibility of consecutive sentences alive. If the sentences had been concurrent, petitioner may have waived his right to complain in this regard by failing to accept the charge. But, the imposition of consecutive sentences made either the merger or the sentence fundamental error since under those circumstances, the finding of an additional fact distinguishing the counts was the most essential ingredient which should have been submitted to the jury.[7]

Usually, if there are two separately indictable offenses, the courts have allowed consecutive punishment. But where, under the evidence, one offense is necessarily incidental and included in another, cumulative punishment has been disallowed under a doctrine sometimes called merger of offenses. Cf. **United States v. Gumbs**, 2 Cir., 246 F. 2d 441, 442. **In re Nielsen**, 131 U. S. 176, 188-189, contains an early expression of this rule in a case which held that a conviction for cohabitation barred a prosecution for adultery. The Court rested its conclusion on the theory that unlawful cohabitation necessarily implied sexual intercourse, and stated (131 U. S. at 188-189):

> "* * * but be that as it may, it seems to us very clear that where, as in this case, a person has been

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[7] *Screws v. United States*, 325 U. S. 91, 107.

tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

"It may be contended that adultery is not an incident of unlawful cohabitation, because marriage of one of the parties must be strictly proved. To this it may be answered, that whilst this is true, the other ingredient (which is an incident of unlawful cohabitation) is an essential and principal ingredient of adultery; and, though marriage need not be strictly proved on a charge of unlawful cohabitation, yet it is well known that the statute of 1882 was aimed against polygamy, or the having of two or more wives; and it is construed by this Court as requiring, in order to obtain a conviction under it, that the parties should live together as husband and wives."

Numerous cases decided by the Appellate Court have held that when the facts established prove that one crime was necessary and incidental to the other, only one punishment may be imposed. Thus in **Schroeder v. United States,** 2 Cir., 7 F. 2d 60, 65, the defendant was convicted of possession and transportation of intoxicating liquor and the Court found that since the same facts proved both crimes that there might be only one punishment. The Court recognized that there might be possession distinct from transportation, such as possession for a substantial time followed by transportation which might constitute two distinct offenses, just as possession for a substantial time followed by a sale might amount to two distinct crimes. The Court concluded that where the only possession shown is that which is necessarily incidental to the transportation, the offense is single and not double. The Court concluded and said, 7 F. 2d 60, 65: "And the law is settled that, where a person is tried and convicted of a crime which has various incidents included in it, he cannot thereafter be tried and

punished for an offense consisting of one or more such incidents. To do so would be to inflict double punishment." We believe it would have been more appropriate to say that while two crimes were committed, it is unlikely to conclude that two punishments were intended. Generally an examination of the evidence is required to determine whether one offense is necessarily incidental to another. Thus in **United States v. Chiarella,** 2 Cir., 187 F. 2d 12, after examining the evidence, the Court found a count which charged possession and a count which charged receipt were not proved because each was included under a count which charged sale of conterfeit money and accordingly reversed the convictions on the first two counts. Cf. **Prince v. United States,** 352 U. S. 322.

Other examples are **Morgan v. United States,** 4 Cir., 294 Fed. 82 (manufacture of moonshine whiskey necessarily includes having possession of the whiskey and possessing property designed for manufacturing of moonshine); **Tritico v. United States,** 5 Cir., 4 F. 2d 664 (proof of possession of distillery apparatus necessarily included in proof of manufacture of liquor); **Gaunt v. United States,** 1 Cir., 184 F. 2d 284 (making a fraudulent statement within jurisdiction of department of United States by filing a fraudulent income tax return embraced within charge of attempting to evade income tax by filing a fraudulent return).

If possession of a forbidden article is a necessary and incidental part of transportation where the evidence fails to disclose a possession distinct from transportation, the possession in each count in the instant case is a necessary and incidental part of possession in the other count. And all the various incidents of both charges are included in possession.

In **United States v. Michener,** 331 U. S. 789, this Court reversed without opinion a decision of the Eighth Circuit,

157 F. 2d 616, where the issue was whether after a guilty plea consecutive sentences could be imposed on one count charging possession of a plate adapted for counterfeiting, and a second count charging that on the same date the accused caused the plate to be made. The per curiam reversal cited **Blockberger v. United States**, 284 U. S. 299; **Albrecht v. United States**, 273 U. S. 1 and **Gavieres v. United States**, 220 U. S. 338. The Eighth Circuit had held that the imposition of cumulative sentences constituted double punishment because it found inconceivable that any additional facts could have been adduced to distinguish the offenses under the two counts. The Court, however, conceded that "under a possible state of facts one could properly be convicted of the two offenses charged in the indictment", 157 F. 2d at 618. The Court below also relied on the concurring opinion in **District of Columbia v. Buckley**, D. C. Cir., 128 F. 2d 17, 21, which held that the application of the same evidence test did not end the matter but that it was necessary for the Court to determine if the difference was "substantial or minor." The reversal may have meant that the determination of the difference was a legislative matter. It should also be noted that the defendant pled guilty and thereby admitted all the facts alleged in each count. In the absence of an examination of the proof, one offense may not have been necessarily included in the other. There was also no issue as to whether the findings of the jury would support double punishment.

Moreover, even in the absence of presumptions, proof of the purchase of heroin knowing the same to have been illegally imported establishes every essential element of buying the same heroin from an unstamped package.[8] A tax is placed on the importation of narcotic drugs which must be paid by the importer and evidence of pay-

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[8] But see *Martinez v. United States*, 220 F. (2d) 740, 742.

ment is shown by the stamped package. Heroin may not be legally imported and illegal imported drugs are not in a stamped package. See Sections 4701 and 4703 of the Internal Revenue Code of 1954. It is true that a domestic manufacturer also has to pay the same tax. But the theory of conviction under count 2 is based on illegal import. The fact that Count 2 charges receipt and concealment instead of purchase is of no significance in view of the fact that the same presumption is applicable to both these offenses under 21 U. S. C. 174. Moreover, receipt and concealment are incidental and necessary parts of a purchase. And the supporting evidence does not so materially vary as to justify two punishments merely because two inferences are attached by different statutes to the same evidential basis. **Copperthwaite v. United States**, 6 Cir., 37 F. 2d 846, 848.

In the related area of lesser included offenses, the courts have never imposed cumulative punishment.[9] Accordingly, where the legislature has defined two distinct offences, but one offense requires proof of all the facts or elements necessary to establish the other plus an additional element, only one punishment may be imposed. In these situations, where the greater offense includes the lesser; it is proper to prosecute the accused under an indictment charging both offenses. If, however, the accused is convicted on both counts, sentences cannot lawfully be imposed on both counts to run consecutively. **Ekberg v. United States**, 1 Cir., 167 F. 2d 380, 385. See also **Rutkowski v. United States**, 6 Cir., 149 F. 2d 481; **Kostner v.**

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[9] See Rule 31 (c) of the Federal Rules of Criminal Procedure. The following are a few illustrations of application of the included offense doctrine. A defendant charged with murder may be convicted of manslaughter if the jury finds an absence of malice. *Stevenson v. United States*, 162 U. S. 313, 315-316, 321-323. A defendant charged with robbery may be found guilty of larceny if the jury finds an absence of force or putting in fear. *Lamore v. United States*, D. C. Cir., 136 F. (2d) 766.

United States, 4 Cir., 193 F. 2d 429; **Tritico v. United States**, 5 Cir., 4 F. 2d 664.

The recent cases of this court in the area of multiple punishment are based on an analysis of congressional intent. It seems apparent that the purpose of Congress in enacting these presumptions was to facilitate convictions and not to multiply sentences. When Congress desired to increase penalties, it did so directly in three separate enactments, the Act of August 12, 1937 (50 Stat. 627), the Boggs Act of 1951 (65 Stat. 767) and the Narcotic Control Act of 1956 (70 Stat. 567). "But when choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." **United States v. Universal C.I.T. Credit Corp.**, 344 U. S. 218, 221-222. "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." **Bell v. United States**, 349 U. S. 81, 83. And when choice has to be made between two interpretations of the court's instructions, before the harsher alternative is chosen, the court should have made clear the issues which, under a jury finding, would support cumulative punishment.

This court has recently held that punishment for each of separate offenses "and not merely different descriptions of the same offense" does not violate the constitutional prohibition against double jeopardy. **Gore v. United States**, 357 U. S. 386, 392. But the government would concede that multiple punishment for the same offense after a single trial would be a violation of double jeopardy. Brief for the United States, Gore v. United States, p. 38. In the instant case, the offense is single either under the statutes, the evidence or the findings of the jury under the instructions. Accordingly, punishing petitioner twice on the sole finding of possession constitutes double punishment.

II.

The instructions in charging the jury to find merely possession in defendants or either of them did not sufficiently and correctly instruct the jury of what it was necessary for them to find in order to convict on each count of the indictment.

If the standards of guilt which Congress has prescribed for the two statutes here involved require findings that petitioner did purchase herein from an unstamped package and that petitioner did receive and conceal the heroin with knowledge of an illegal import, the jury did not find those ingredients of the two statutes and the charge was erroneous in directing a verdict upon proof of a certain fact, possession.[10] Where the error in instructions is so fundamental as not to submit to the jury the essential ingredients of the crime or crimes on which the conviction rest, the Court must take note of the error on its own motion. **Screws v. United States,** 325 U. S. 91, 107. The Court in its instructions, as we have pointed out, did not tell the jury that the statutory presumptions merely shifted to the accused the burden of going forward with the evidence. Nor was the jury charged that that might infer guilt from possession, but the jury was in effect directed to return a conviction from proof of possession.[11]

Moreover, every time that the Court instructed the jury with regard to possession, it permitted a finding that "defendants, or either of them" did possess the drugs (R. 107, 111). The charge told the jury to convict petitioner if one of his co-defendants had possession of the narcotics. Such instructions were particularly prejudicial since petitioner's defense was to the effect that he had not been in the premises where the narcotics were found and co-

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[10] Cf. *Morris v. United States,* 10 Cir., 156 F. 2d 525.

[11] Cf. *Bates v. United States,* D. C. Cir., 219 F. 2d 30, 33.

defendant Gladys Stamps admitted she was in the room with the heroin. Under such instructions, the jury may have convicted petitioner even if it believed all of his evidence.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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October, 1958.

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 11.

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR THE PETITIONER.

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ARGUMENT.

The government contends that "the decision in **Gore** is based on the assumption that all that the government proved was one act of sale with the possession involved in that sale." Govt. Br., p. 13. But there is nothing in the opinion to warrant that assumption. While the **Gore** case decided the issue whether an indictment arising out of a single sales transaction could be the basis of multiple punishment, questions relating to the evidence were not before the Court. Furthermore, if the evidence in that

case is examined, it will be found that there was no need to resort to any statutory presumption to sustain the conviction. The evidence showed that the defendant after selling to an undercover agent "delivered the narcotics to the agent in an unstamped package without use of any order form." Govt. Br., Gore v. United States, p. 38. The proof thus indicated both a sale without stamps and a transportation of illegally imported narcotics. The presumption statutes were not used in lieu of evidence of additional facts distinguishing the two offenses. **Gore** is simply a case where in the course of one transaction, the evidence showed that the defendant violated several statutory prohibitions.

While reason may support the statutory presumptions which require the accused to explain his possession, cf. **Morrison v. California,** 291 U. S. 82, 88-91, considerations of fairness do not necessitate the imposition of double punishment if he fails to supply such an explanation. For example, while it may be reasonable to assume that a possessor is either a purchaser or a person who has facilitated the concealment of the drug, it is not reasonable to assume that he is both. The presumption of innocence which the law gives to the accused extends to every element of the crime. **Morissette v. United States,** 342 U. S. 246, 275. A possessor need not be a purchaser. A possessor need not facilitate the concealment of the drug. Indeed the statutes so recognize by making proof of possession sufficient evidence for conviction of sale, purchase, transportation and concealment. By these presumptions Congress in effect has said that if the law enforcement officials are in doubt or if the evidence which may be adduced is doubtful as to what particular wrong a defendant has committed in connection with the narcotics laws, the accused may be punished unless he convinces a jury that he is not guilty of any wrongful conduct. Its purpose is to punish wrongdoing where there is no specific

evidence to show which requirement was violated or which act was committed.

Moreover, the government has presented no reason in principle or in legislative history which warrants double punishment upon proof of the single fact of possession. It simply relies on the statutory presumptions which permit multiple offenses to be presumed from that fact and which presume the existence of a fact in one offense not essential to the other. An intent of Congress to permit separate punishment for violation of each narcotic enactment arising out of one act of sale does not demonstrate an intent to allow multiple punishment in cases which rely solely on the statutory presumptions which it created. It is one thing to authorize multiple punishment from proof of a single transaction such as a sale or purchase which is specifically forbidden when made in defiance of specific regulatory controls. It is quite a different thing to permit such punishment from proof of a single fact, possession, which by statutory presumption merely constitutes sufficient evidence to prove a transaction to which the narcotic laws are applicable. Congress has not said that possession in defiance of the statutory commands is a crime. Permitting multiple punishment upon the presumptions raises possession to the status of a sale or purchase and for all practical purposes makes it a component part of each narcotic crime.

The government contends that "the instructions were fairly in accord with the mandate of Congress." Govt. Br., p. 22. If this contention is correct, it illustrates the fact that to allow double punishment in this case is to place different labels on the same thing.

Congressional power to facilitate convictions by substituting presumptions for proof is not without limitation. **Tot v. United States**, 319 U. S. 463. It is a drastic power based upon the need to shift the burden of proof to the

accused in order to secure a conviction where there are difficult problems of proof. There is no reason to use this power to obtain multiple punishment. It would seem that when Congress chooses to substitute a presumption for proof and makes the same presumption applicable to two statutes, the rule of lenity should be especially applicable.

CONCLUSION.

For the reasons set out above and for those set out in petitioner's original brief, the judgment of the court below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1957

NATHANIEL HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 591

NATHANIEL HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 13–22) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1957 (Pet. App. 23). The petition for a writ of certiorari was filed on October 31, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether consecutive sentences could validly be imposed for illegal purchases of heroin and its receipt and concealment.

2. Whether the court's charge to the jury properly required findings as to the necessary elements to constitute these two separate offenses.

STATUTES INVOLVED

26. U. S. C. (1952 ed., Supp. IV) 4704 (a), Sec. 4704 of the Internal Revenue Code of 1954, 68A Stat. 550, provides:

> (a) *General requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

26 U. S. C. (1952 ed., Supp. III) 7237 (a), Section 7237 of the Internal Revenue Code of 1954, 68A Stat. 860, provided as follows:

> (a) *Violation of law relating to opium and coca leaves and marihuana.*—Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. * * *

21 U. S. C. 174, Section 2 (c) of the Narcotic Drugs Import and Export Act, 35 Stat. 614, as amended by the Act of November 2, 1951, 65 Stat. 767, provides as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.[1]
>
> * * * * *
>
> Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

---

[1] By the Act of July 18, 1956, c. 629, Title I, Secs. 103 and 105, 70 Stat. 568, 570, the maximum penalties were increased to twenty years for a first offender and to forty years for a second or subsequent offense both under this statute and under Section 7237 of the Internal Revenue Code of 1954.

STATEMENT

Petitioner, Gladys Stamps, and Clarence Robinson were charged in a two-count indictment (R. 1–2)[2] returned in the United States District Court for the Eastern District of Missouri with (1) purchasing 224 grains of heroin other than in or from the original stamped package in violation of 26 U. S. C. 4704 (a) (*supra*, p. 2); and (2) receiving and concealing this heroin knowing that it had been imported contrary to law, in violation of 21 U. S. C. 174 (*supra*, pp. 2–3). The jury found all three defendants guilty on both counts (R. 6; Tr. 221–222). Petitioner was given consecutive sentences of five years' imprisonment and a $1.00 fine on each count, making an aggregate sentence of ten years' imprisonment and a $2.00 fine (R. 9; Tr. 243). On appeal (R. 10), petitioner's conviction was unanimously affirmed (Pet. App. 23).

Evidence adduced at the trial may be summarized as follows:

On February 8, 1956, at about 2:00 a. m., two St. Louis police officers, named Robinson and Foxworth, looked into separate windows on the ground floor of an apartment at 4567 McMillan Avenue (Tr. 27, 31, 46–47, 68–69). Officer Robinson saw defendant Stamps standing alongside the defendant Robinson, who was seated next to a bed on which there was white powder on a mirror (Tr. 32, 33). Defendant Robinson had his hands in this powder (Tr. 61). Officer Foxworth saw petitioner looking at something he was holding in his left hand and over which he made a motion with his

[2] "R." refers to the paginated record. "Tr." refers to the typewritten transcript of the trial proceedings.

right hand (Tr. 69–70, 87, 103–104). When the officers went to the door of the apartment and announced from the hallway that they were police officers, petitioner and the other two defendants escaped through a window (Tr. 35–36, 71–72). The officers recovered the powder on the mirror, some filled capsules, a box of empty capsules, eye droppers, needles, and a flour sifter. Some capsules were taken from a coat found in the room (Tr. 37–42, 73–77). The officers turned this evidence over to the federal narcotics authorities. (Tr. 111–114). It was shown that the powder on the mirror was heroin, and that about 174 capsules were filled with heroin (Tr. 15–17, 111–113). There was no evidence of any taxpaid stamps for these narcotics. The heroin and paraphernalia were introduced in evidence as Exhibits 1, 2, and 3 (Tr. 122).

Petitioner's defense was an alibi. Petitioner and Miss Stamps both testified that he was not present in the room at 4567 McMillan on the night of the raid (Tr. 146, 126). Miss Stamps and Gola Mason testified that Mason (not petitioner) was the person with her and Robinson on that night (Tr. 126, 152–154).

In the charge to the jury, the trial judge read the pertinent provisions of 26 U. S. C. 4704 (a) and 21 U. S. C. 174 (*supra*, pp. 2–3), and the two counts charged in the indictment under these sections (Tr. 197–200). Continuing, the court instructed (Tr. 200):

> So the question under each count of this indictment resolves down to whether or not the defendants, or either of them did possess this narcotic drug on the 8th day of February of this

year, out there in the room at 4567 McMillan, identified here in evidence.

Later in the charge the court instructed (Tr. 205-207):

> Now, under the law as provided for the offense charged in Count 1 of the indictment, for the unlawful purchase of a narcotic drug, the absence of appropriate taxpaid stamps from the narcotic drugs in one's possession shall be prima facie evidence of a violation of the law on which Count 1 is based, as I read it to you, by the person whose possession of such drugs may be found. So, if you find and believe from all the evidence, beyond a reasonable doubt, that the defendants, or either of them, possessed the narcotics mentioned in Count 1, and that the said narcotic did not bear the required Internal Revenue tax stamps, then you will find the defendants, or either of them, guilty as charged in Count 1. Unless you so find, you will find the defendants, and each of them, not guilty.
>
> Now, under the law as provided for the offense charged in Count 2 of the indictment, the law provides that when on trial for receiving and concealing and facilitating the concealment of a narcotic drug, the defendants, or either of them, are shown to have had possession of such drug, such possession shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defendants, or either of them, explain their possession to your satisfaction. By explaining their possession to your satisfaction, as used in the statute, is meant that if the defendants, or either of them, had possession of

the narcotic drug they will have to explain that it came to them legally, and without that explanation you would be authorized to find the defendants, or either of them, guilty as to Count 2 of the indictment. The possession contemplated by the statute which applies to Count 2 of the indictment need not be personal and exclusive. It need not be immediate. It is sufficient if the evidence shows the defendants, or either of them, to have had possession of the narcotic on February 8, 1956, at 4567 McMillan.

The court instructs the jury that unless you find that the defendants, or either of them, had possession of the narcotics mentioned in Counts 1 and 2 of the indictment, and unless you find and believe that such narcotics were under the dominion and control of the defendants, or either of them, at the time and place mentioned in the indictment, you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2.

ARGUMENT

1. Petitioner contends that the prosecution proved only the single fact of possession of the heroin, and that since, at most, only one offense was provided, it was error to impose the cumulative sentences of five years' imprisonment on each count (Pet. 7–10, 12).

Under established decisions, separate and consecutive sentences for violation of the two statutes involved were properly imposed, even though each offense arose from the same act. Each offense required proof of a fact which the other did not. Cf. *Blockburger* v. *United States*, 284 U. S. 299, 304;

Gore v. *United States,* 244 F. 2d 763 (C. A. D. C.), pending on petition for certiorari (No. 76 Misc., Oct. Term, 1957). As we have discussed in the brief in opposition in *Gore,* the recent decisions on the issue of multiple offenses (*Prince* v. *United States,* 352 U. S. 322; *Bell* v. *United States,* 349 U. S. 81; *United States* v. *Universal C. I. T. Credit Corp.,* 344 U. S. 218) have scrupulously refrained from overruling *Blockburger* or rejecting generally its rationale. This Court, on the same day it handed down the *Prince* decision (February 25, 1957), declined to review a decision as to separability of narcotics offenses. *United States* v. *Johnson,* 235 F. 2d 159 (C. A. 7), certiorari denied, 352 U. S. 1006 (see the government brief in opposition, No. 345 Misc., Oct. Term, 1956).[3] Enactment of the Boggs Act (65 Stat. 767), which was designed to increase penalties for narcotics violations, certainly had no effect on the doctrine of separate offenses laid down by *Blockburger.* See *United States* v. *Brisbane,* 239 F. 2d 859 (C. A. 3); *United States* v. *Lewis,* 227 F. 2d 524 (C. A. 2), certiorari denied, 350 U. S. 974; *Everett*

[3] This was three months after the Court had granted certiorari in the *Bartkus*, *Hoag*, and *Ladner* cases (see Pet. 10). *Bartkus* involves issues of double jeopardy between different sovereignties, state and federal. *Hoag* presents issues of double jeopardy where a defendant, acquitted of robbery of several persons, was retried for the robbery of another, present at the same time, who had testified as a witness at the first trial. *Ladner*, the federal case, raises an issue as to the validity of multiple sentences for interfering with federal officers by the wounding of two officers riding in the same car. This Court indicated in *Prince* v. *United States*, 352 U. S. at 325, that, in general, decisions in this field would be confined to the particular statute involved.

v. *United States*, 227 F. 2d 457 (C. A. 6); *Beacham* v. *United States*, 218 F. 2d 528 (C. A. 10).

Actually, in this case there was adequate proof of separate acts. The defendants were in actual receipt and in the process of concealing the heroin in violation of 21 U. S. C. 174 when they were apprehended. The nature of their activities was such as to indicate that they knew it had been imported contrary to law. In view of the absence of stamps, there was also justification for concluding that an illegal act of purchase, separate from the receipt and concealment, had occurred.

2. a. Petitioner asserts that the court's charge was erroneous in that it equated both offenses, *i. e.*, the purchase, and the receipt, and concealment, of the heroin, with mere possession (Pet. 10–11). Petitioner makes this argument by emphasizing and taking out of context the part of the charge stating that "the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug * * * " (Tr. 200).

The charge as a whole made clear the separate nature of the two offenses. The judge carefully read both statutes to the jury (Tr. 197–199), and specifically read count one as charging that petitioner did "purchase" the narcotics, and count two, that he did "receive and conceal, and facilitate [their] concealment" (Tr. 199, 200). Shortly thereafter, the court's charge required findings that petitioner performed "the acts complained of" before he could be found guilty (Tr. 201). The charge also pointed out the government's position that petitioner purchased

the narcotics under count one, and received and concealed them under count two (Tr. 204, 205, 206). Of course, both counts are, under the applicable statutes, supported by the presumption arising from possession, so that the judge properly referred thereto. But the judge also made clear that there was both direct and circumstantial evidence in the case (Tr. 207–210), and that there was to be a separate verdict as to each count (Tr. 218–219).

b. There is no merit in petitioner's contention that under the charge (see Tr. 205–207; *supra,* pp. 6–7) the jury could have found all defendants, including petitioner, guilty, if they found only that "either of them" had possession (Pet. 11). Nowhere did the court instruct that, if either had possession, all should be convicted; nor did the court instruct that if either had possession all must explain possession. Rather, the instructions stated that either, or all, or none of the defendants might be in possession. Other parts of the charge, moreover, clearly indicated that each defendant's guilt or innocence was to be determined separately. Thus, the court charged, "The burden of proving the guilt of each of the defendants rests upon the prosecution" (Tr. 202); and "* * * each of the two counts of the indictment constitute a separate charge, and each count of the indictment should be considered by you in arriving at the guilt or innocence of each defendant separately" (Tr. 218).

It is significant also that, at the conclusion of the court's charge, counsel for petitioner announced that he had "no exceptions" (Tr. 220). Having failed to make in a timely manner the objections now advanced,

petitioner is in no position to urge them now. See Rule 30, F. R. Crim. P.;[4] *United States* v. *De Marie*, 226 F. 2d 783, 787 (C. A. 7), certiorari denied, 350 U. S. 966.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1957.

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[4] Rule 30 provides in part: "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *"

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BRIEF FOR THE UNITED STATES

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 124–131) is reported at 248 F. 2d 196.

JURISDICTION

The judgment of the Court of Appeals was entered on October 2, 1957 (R. 32). The petition for a writ of certiorari was filed on October 31, 1957, and granted on June 30, 1958 (357 U. S. 935). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether consecutive sentences could validly be imposed for (a) purchase of heroin from an unstamped package and (b) receipt and concealment of

the same heroin knowing it to have been unlawfully imported, upon a showing that petitioner was in possession of unstamped heroin.

2. Whether the court's charge to the jury properly required findings as to the elements necessary to constitute these two separate offenses.

STATUTES INVOLVED

26 U. S. C. (1952 ed., Supp. V) 4704 (a), Sec. 4704 of the Internal Revenue Code of 1954, 68A Stat. 550, provides:

> (a) *General requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

26 U. S. C. (1952 ed., Supp. III) 7237 (a), Section 7237 of the Internal Revenue Code of 1954, 68A Stat. 860, provided as follows:

> (a) *Violation of law relating to opium and coca leaves and marihuana.*—Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000

and imprisoned not less than 10 or more than 20 years. * * *

21 U. S. C. 174, Section 2 (c) of the Narcotic Drugs Import and Export Act, 35 Stat. 614, as amended by the Act of November 2, 1951, 65 Stat. 767, provides as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.[1]
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> * * * * *

[1] The Narcotic Control Act of 1956, 70 Stat. 567, was enacted on July 18, 1956, after commission of the offenses here in question and after petitioner's conviction, and thus is not applicable to this case. By that Act, 70 Stat. 568, 570, c. 629, Title I, Secs. 103 and 105, the maximum penalties were increased to twenty years for a first offender and to forty years for a second or subsequent offense under this statute. This Act also amended Section 7237 of the Internal Revenue Code of 1954, increasing the maximum penalties for violation of Sec. 4704 (a) to 10 years for a first offense, 20 years for a second offense and 40 years for a third or subsequent offense.

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

Petitioner, together with Gladys Stamps, and Clarence Robinson, was charged in a two-count indictment (R. 1–2) returned in the United States District Court for the Eastern District of Missouri on February 17, 1956 with (1) purchasing 224 grains of heroin other than in or from the original stamped package in violation of 26 U. S. C. 4704 (a) (*supra,* p. 2); and (2) receiving and concealing this heroin knowing that it had been imported contrary to law in violation of 21 U. S. C. 174 (*supra,* p. 3). Following a jury trial, on April 17, 1956, all three defendants were found guilty as charged (R. 121). Petitioner was given consecutive sentences of five years' imprisonment and a one dollar ($1.00) fine on each count (R. 122–123). On appeal, petitioner's conviction was unanimously affirmed (R. 132).

Evidence adduced at the trial may be summarized as follows:

1. On February 8, 1956, at about 2:00 a. m., officers Robinson and Foxworth of the St. Louis Police Department, while on their beat, looked from the outside through separate windows into the ground floor apartment at 4567 McMillan Avenue (R. 12, 14–15, 38–39).

Officer Robinson testified that he saw defendant Robinson seated next to a bed, with defendant Stamps standing alongside him (R. 15–16). He was able to see a mirror on the bed upon which there was white powder (R. 16). Defendant Robinson had his hands in the powder and defendant Stamps was watching him (R. 34). Officer Foxworth, from his vantage point, saw petitioner looking at something he was holding in his left hand over which he made a motion with his right hand (R. 39–40, 62). Immediately following their surveillance, the officers went to the door of the apartment and officer Foxworth announced that they were police (R. 16–17, 41). The officers heard a shuffling in the apartment and, by the time they gained entry, petitioner and the other two defendants had escaped through a window (R. 17–18, 41–42). The officers recovered the white powder on the mirror, 169 filled capsules, a box of empty capsules, eye droppers, syringes, needles and a flour sifter, and 5 loose capsules taken from a coat in the room (R. 4–7, 18–23, 42–44, 54). Of course, no tax stamps were, or could have been, affixed to the loose powder or capsules. As officer Foxworth testified, it was "impossible to mark the capsules" (R. 54).

Thereafter, at about 10:00 a. m. the same morning, officer Robinson turned over this evidence to federal narcotics agent Bernard A. Theisen, Jr. (R. 24, 67–69). The powder found on the mirror was tested and found to contain heroin. The capsules were also tested and found to be filled with heroin (R. 5–6, 67–69). The

heroin and paraphernalia were identified as Exhibits 1, 2 and 3 (R. 4–6, 20).

2. Petitioner's defense was an alibi. Petitioner and defendant Stamps both testified that he was not in the room at 4567 McMillan on the night of February 8 (R. 75–77, 86–88). Petitioner testified that he spent the night at the home of Grace Draper (R. 86–87; see, also, the testimony of Grace Draper, R. 82–86). Miss Stamps and Mr. Gola Mason testified that Mason (not petitioner) was the person with her and Robinson on that night (R. 76, 92–95).

Agent Theisen testified that shortly before the trial defendants Robinson and Stamps informed him that petitioner had been with them in the room at 4567 McMillan on the night of the raid and that the heroin belonged to petitioner (R. 71, 73).

3. Early in his charge to the jury, the judge read the relevant provisions of 26 U. S. C. 4704 (a) and 21 U. S. C. 174 (*supra*, pp. 2–3), and the two counts which were drawn under these sections (R. 105–107). The court then observed (R. 107):

> So the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug on the 8th day of February of this year, out there in the room at 4567 McMillan, identified here in evidence.

The trial judge thereafter explained the presumptions, under these two statutes, by instructing as follows (R. 110–111):

> Now, under the law as provided for the offense charged in Count 1 of the indictment, for

the unlawful purchase of a narcotic drug, the absence of appropriate taxpaid stamps from the narcotic drugs in one's possession shall be prima facie evidence of a violation of the law on which Count 1 is based, as I read it to you, by the person whose possession of such drugs may be found. So, if you find and believe from all the evidence, beyond a reasonable doubt, that the defendants, or either of them, possessed the narcotics mentioned in Count 1, and that the said narcotic did not bear the required Internal Revenue tax stamps, then you will find the defendants, or either of them, guilty as charged in Count 1. Unless you so find, you will find the defendants, and each of them, not guilty.

Now, under the law as provided for the offense charged in Count 2 of the indictment, the law provides that when on trial for receiving and concealing and facilitating the concealment of a narcotic drug, the defendants, or either of them, are shown to have had possession of such drug, such possession shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defendants, or either of them, explain their possession to your satisfaction. By explaining their possession to your satisfaction, as used in the statute, is meant that if the defendants, or either of them, had possession of the narcotic drug they will have to explain that it came to them legally, and without that explanation you would be authorized to find the defendants, or either of them, guilty as to Count 2 of the indictment. The possession contemplated by the statute which applies to Count 2 of the indictment need

not be personal and exclusive. It need not be immediate. It is sufficient if the evidence shows the defendants, or either of them, to have had possession of the narcotic on February 8, 1956, at 4567 McMillan.

The court instructs the jury that unless you find that the defendants, or either of them, had possession of the narcotics mentioned in Counts 1 and 2 of the indictment, and unless you find and believe that such narcotics were under the dominion and control of the defendants, or either of them, at the time and place mentioned in the indictment, you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2.

The court made plain that the presumption of innocence "applies to every element of the charge against a defendant, and remains with the defendants, and each of them, until the evidence in the case overthrows it, and [the jury is] satisfied beyond a reasonable doubt that any defendant is guilty of the charge set forth in the indictment" (R. 108); and that "in order to find the defendants, and each of them, guilty, you must not only believe that the defendants, and each of them, did the acts complained of, and of which the defendants, and each of them, stand charged, but you must also believe that the acts were intentionally and knowingly done by such defendants, and each of them" (R. 108).

Petitioner took no exceptions to the charge (R. 120).

4. The Court of Appeals unanimously affirmed the conviction, noting that "[t]he jury was sufficiently and correctly instructed of what it was necessary for them

to find from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment" (R. 124–131, 128).

SUMMARY OF ARGUMENT

I

In *Gore* v. *United States,* 357 U. S. 386, this Court held that consecutive sentences could validly be imposed for three separate violations of three different statutory requirements with respect to narcotics even though the three offenses derived from one act of sale. Here, petitioner was convicted of, and given consecutive sentences on, two of the three offenses involved in *Gore.* On the question of the separateness of the offenses we see no distinction between the two cases.

The case is not significantly different from *Gore* because here the jury was permitted to find petitioner guilty of each offense on proof of possession and the presumptions arising therefrom. In this case possession created a presumption of violation of two different statutory requirements, just as in *Gore* possession created the same presumption of violation of the same requirements. See the dissenting opinion of Mr. Justice Brennan, 357 U. S. 397–398. The only count involved in *Gore* not present here is sale without a written order (26 U. S. C. (Supp. V) 4705 (a)) which must be proved only by direct evidence without resort to any presumption. Thus, it makes no difference, for the purposes of this case, whether the single transaction which proves the offenses happens to be a sale or simply possession. The important question is whether

the requirements separately imposed by Congress in separate statutes have been violated, as the jury found.

II

There was no error in the judge's charge. The judge carefully read both statutes to the jury and delineated the separate presumptions under each statute, noting that under count 1 the crucial fact giving rise to the statutory presumption was the absence of appropriate tax-paid stamps on the possessed narcotics, whereas under count 2 possession of narcotics would be deemed sufficient evidence to authorize conviction unless the possession was explained. He told the jury that they must find the petitioner "did the acts complained of", that each count constituted a separate charge, and that a separate verdict was to be returned as to each count.

There was no greater emphasis on possession than the statutes require. And if there had been, it could not have injured petitioner. At most, by emphasizing possession, the court would have limited the jury's consideration of both counts to the statutory presumptions and so removed from the case any consideration the jury might have given to petitioner's flight as evidence of his guilty knowledge. Emphasis on the importance of possession was consistent with petitioner's sole defense, which was not an attempt to explain or justify that possession, but to deny that he ever had it because he was not present when the premises were raided. Significantly, petitioner's trial attorney made no objection to the charge. Petitioner's present objections come too late. Rule 30, F. R. Crim. P.

ARGUMENT

I

UNDER GORE V. UNITED STATES, 357 U. S. 386, THE TWO OFFENSES HERE INVOLVED WERE SEPARATE EVEN THOUGH THEY AROSE OUT OF ONE ACT.

In the instant case, petitioner was given consecutive sentences under a two-count indictment charging (1) purchase of heroin other than from the original stamped package in violation of 26 U. S. C. 4704 (a), *supra*, p. 2, and (2) receipt and concealment of this heroin knowing that it had been imported contrary to law in violation of 21 U. S. C. 174, *supra*, p. 3.

In *Gore* v. *United States*, 357 U. S. 386, the defendant was given consecutive sentences for three offenses. The offenses were (1) sale not pursuant to a written order form; (2) purchase, sale and distribution not in or from a stamped package; and (3) transportation and concealment of illegally imported narcotics. In upholding the consecutive sentences, the Court assumed that the three offenses "derive from a sale", *i. e.*, from one transaction (see 357 U. S. at p. 837). It said:

> It is one thing for a single transaction to include several units relating to a proscribed conduct under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times, all to the end of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics. Both in the unfolding of the sub-

stantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws.

The Court held that there was no occasion for application of the rule of lenity because the history of the three statutes involved, their separate enactments at different times, and the purpose to tighten controls, all demonstrated the Congressional intent to permit separate punishment for the different violations in the one act of sale. The majority opinion states, 357 U. S. at p. 389: "The fact that an offender violates *by a single transaction* several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic" (emphasis added).

The two offenses here charged are two of the three offenses before the Court in *Gore*. (The only offense present in *Gore* not present here is sale not pursuant to a written order form (26 U. S. C. (Supp. V) 4705 (a)) which must be proved only by direct evidence without resort to any statutory presumption.) On the question of the separateness of the offenses, we see no distinction between the two cases.

Petitioner attempts to distinguish this case from *Gore* on the grounds that the record here shows that the trial judge permitted the jury to find petitioner guilty of each offense merely on proof of possession and the presumption arising therefrom. That does not distinguish this case from *Gore*. While *Gore* arose in the context of a proceeding under 28 U. S. C.

2255, the record of the trial was before the Court, including the instructions on the presumptions arising from possession which were, as were the instructions here, based on the statutory language.[2] As noted, the decision in *Gore* is based on the assumption that all that the government proved was one act of sale with the possession involved in that one act of sale. The decision is, as the quotations already given clearly demonstrate, bottomed upon the assumption that only a single transaction was proved.[3] The Court found that so long as the three requirements proscribed by the three different statutes were violated—*i. e.*, so long as the narcotics were illegally imported, so long as there was no order form, and so long as there was no stamped package—there were three offenses, although there was only one act with respect to exactly the same narcotics. That is the situation here. Assuming that the possession which gives rise to the presumption is exactly the same under each statute,[4] that

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[2] We have relodged the transcript of the trial in *Gore* with the Clerk of this Court. See pp. 83–84 of that transcript.

[3] In *Blockburger* v. *United States*, 284 U. S. 299, the offender was charged, convicted, and cumulatively sentenced for selling narcotics not in the original stamped package and not in pursuance to a written order. Both offenses derived from a single sale. The case came to this Court on direct appeal and it was held that the offenses were separate and separately punishable. The decision in *Gore* rested, in large part, upon this earlier decision—this Court saying "We adhere to the decision in *Blockburger* v. *United States*" (357 U. S. at 388). There was no intimation that affirmance of the legality of the term of imprisonment rested on the narrower scope of review available on a motion to correct sentence as against direct appeal.

[4] Under 21 U. S. C. 174, proof of possession alone is presumptive evidence of illegal importation. Under 26 U. S. C. 4704 (a), the presumption arises from the absence of stamps

possession nevertheless proves violations of two different statutory requirements. It shows a purchase without stamps, and a handling of narcotics which had been illegally imported. And, as already noted, *Gore* holds "the fact that an offender violates by a single transaction several regulatory controls * * * does not make the several different regulatory controls single and identic." We cannot see that it makes any difference whether the single transaction which proves the offenses happens to be sale or possession.[5]

The important question is whether the requirements separately imposed by Congress in separate statutes have been disregarded by the defendant. Here, these separate requirements have been violated, and separate punishment is therefore, under the *Gore* decision, clearly authorized. If this Court had found that there was ambiguity with respect to the Congressional intent so as to justify application of the rule of lenity,[6] then it would have been necessary to decide whether there was presented the factual situation of one single transaction to which that rule relates. Cf. *Ladner* v.

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on drugs to make out a presumptive violation "by the person in whose possession" the drugs are found. Possession of unstamped drugs would, as petitioner argues, be sufficient to give rise to the presumption under each statute. See the dissenting opinion of Mr. Justice Brennan in *Gore*, 357 U. S. at 397.

[5] Where there is direct evidence of a sale, the jury may credit that testimony as well as resort to the statutory presumption with respect to 21 U. S. C. 174 and 26 U. S. C. 4704 (a). See the government's brief in *Greene* v. *United States*, No. 134, pp. 18–19. So long as the jury is charged, as it was in *Gore* (Tr. 83–84), that it may convict on the statutory presumption alone this does not serve to distinguish the sale from the possession cases.

[6] Cf. the dissenting opinion of the Chief Justice in *Gore*.

United States, No. 2, this Term, decided Dec. 15, 1958, in which this Court remanded the case to the district court for a hearing to determine the factual situation disclosed at the trial. There might then have been some materiality in petitioner's argument that possession and the presumptions arising therefrom are, in practical effect, so integral a part of the government's proof that (even though the possession is only evidence of an element of the offense, and not an element of the offense itself) one possession should not be allowed to give rise to more than one offense.[7] But in view of the precise

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[7] Under the general rule that courts look to the elements of the offense as defined by Congress and not to the proof of these elements, the courts have emphasized that possession is not made an offense under any of the statutes, but merely evidence of the proscribed acts which can be discrete. *E. g.*, *Corollo* v. *Dutton*, 63 F. 2d 7, 8 (C. A. 5):

"Each count charges a separate and distinct offense. Each count requires to make it out, proof of a fact additional to that required to make out the offense under the others. Subdivision (f) of Section 1 of the statute (Act of May 26, 1922 [21 U. S. C. § 174] does indeed provide that proof of possession alone makes a prima facie case under each count * * *. This subdivision does not define the substantive offenses; it deals with their proof. It merely makes proof of possession presumptive evidence, prima facie, of the facts essential to make out a case. While proof of possession operates with equal force under each count, the presumption which it raises is, as to each count, of the facts essential to conviction under it. *It is to the statutes denouncing the offenses charged in each of the counts that we must look to determine whether the facts required in proof of each are the same.* An examination of them shows that quite the contrary is true. The fact essential in proof of the second count is the purchase of morphine not in or from the original stamped package. The essential fact in the third count is the sale of morphine not in pursuance of a written order. The essential fact in the fourth count is knowingly receiving and

holding in *Gore* that the offenses are separate *even if arising out of the same transaction,* the fact that the offenses are proved by the same evidence is clearly immaterial.

In a particular case, two clearly separable offenses, such as destruction of property and the taking of life, might be proved by the same evidence of one act, such as the throwing of a rock through a window. This would not make the two offenses the same. So here, as long as the offenses were intended by Congress to be separate, it makes no difference how the proscribed conduct is proved. If proof of one sale, which may be an ingredient of each of the three offenses, will support separate punishments, then proof of one possession, which is only evidence of the violations, can as well support separate punishments. Congress has said in separate statutes that concealing unlawfully imported narcotics and buying narcotics not from a stamped package are separately punishable. Proof of possession of unstamped narcotics[8] would show both

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concealing morphine which had been unlawfully imported into the United States. The case falls directly within, and is controlled by, the Blockburger Case, * * *." (Emphasis added.)

To the same effect see *McDade* v. *United States*, 206 F. 2d 494, 495 (C. A. 6), certiorari denied, 346 U. S. 889; *Velasquez* v. *United States*, 244 F. 2d 416, 418 (C. A. 10).

[8] There is no question that the narcotics which the government claimed were in petitioner's possession in loose powder and capsule form were, in fact, unstamped. (R. 126–127 [opinion below].) See p. 5, *supra*. Cf. *Casey* v. *United States*, 276 U. S. 413, 417, where narcotics were sent by soaking towels in a solution of the drug. Mr. Justice Holmes, writing for the Court, said "* * * it safely may be inferred that he [petitioner] did not proclaim his illegal purpose by putting stamps upon the towels."

that the drugs were bought from an unstamped package and that there had been a receipt and concealment of drugs which had been illegally imported—that the purchase and stamp requirements of one section, and the handling and illegal importation requirements of the other, had been violated. Two separate offenses were therefore committed even if both were proved by the one act.[9]

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[9] Petitioner raises a question (Pet. Br. 15) as to whether one possession can be relied upon to prove separate offenses under the same statute, *e. g.*, separate counts for buying, selling and illegal concealment under 21 U. S. C. 174. That issue is not here involved. In this case, petitioner was charged with only a single offense under each statute, and there certainly can be no valid claim here that possession of unstamped narcotics, where unexplained, may not, on the one hand, logically be deemed to warrant the conclusion that these narcotics were not purchased in or from the original stamped package in violation of Section 4704 (a), and, on the other, that such unexplained possession may not authorize conviction for receipt and concealment of narcotics with knowledge of their illegal importation. *Casey* v. *United States*, 276 U. S. 413; *Yee Hem* v. *United States*, 268 U. S. 178.

As we have pointed out *supra*, p. 16, the rule of lenity does not make one offense out of two clearly separable acts occurring at two different times, motivated by separable impulses. Cf. *Ladner* v. *United States*, No. 2, this Term, decided Dec. 15, 1958. Hence, if such separable acts as purchase and sale are shown to have occurred at different times, there is no reason why they should not be two separate offenses even under the same statute. Whether proof of only one of those acts, or proof only of possession, justifies the conclusion that such separable acts as purchase and sale occurred so as to constitute multiple violations of a single statute is a question which is not here presented. See the government's brief in opposition in *Yancy* v. *United States*, No. 64 Misc., O. T. 1958.

II.

THE INSTRUCTIONS OF THE TRIAL COURT WERE PROPER.

Much of petitioner's argument goes to the very limited question of whether, in this case, the trial judge properly instructed the jury. He contends that the charge contained fatal error because no differentiation was made between the two offenses—the jury being directed to find the defendants guilty under both statutes upon the single fact of possession (Pet. Br. 14, 17–20, 23, 30). In support, petitioner particularly emphasizes that portion of the charge to the effect that "the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug * * *" (R. 107). He reasons from this that the jury was foreclosed from finding any different elements in the two offenses, and therefore that consecutive sentences could not be imposed. His challenge, however, does not withstand analysis.

1. At the outset of the charge, the judge read both statutes to the jury (R. 105–106) and specifically distinguished the two counts which he also read to the jury. (R. 107). The judge also delineated between the separate presumptions under each statute, noting that, under count one, the crucial fact giving rise to the statutory presumption was "* * * the absence of appropriate taxpaid stamps from the narcotic drugs in one's possession * * *" (R. 110), and that, under count two, "possession of such drugs * * * shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defend-

ants, or either of them, explain their possession to your satisfaction" (R. 111). He then went on to instruct as to the difference between direct and circumstantial evidence (R. 112–113), significantly pointing out to the jury that it was their task to deduce from all the facts and circumstances whether defendants were guilty beyond a reasonable doubt. The jurors were required to "believe that the [petitioner] * * * did the acts complained of * * *" (R. 108) before they could convict and were finally cautioned that each count constitutes "a separate charge" and a separate verdict was to be returned on each charge (R. 118–119). In totality, then, the instructions specifically informed the jury of the elements of each offense. Petitioner is therefore in error when he compares this charge with that deemed invalid in *Morris* v. *United States,* 156 F. 2d 525, 528 (C. A. 9), where the Court of Appeals found that the trial court had failed to "define the offense of which the appellant was charged and was being tried. * * *." Here, the law of the case as to the separate offenses was spelled out on several occasions.

In his reference to possession, the trial judge was merely following the directives of the two statutes. But he did not, as petitioner would have it, stop there. He not only read each statute as well as each count in full (R. 106–107), but he spelled out the effect and purpose of each presumption (R. 110–111), and he required further that the jury find the defendants guilty of each count in a separate verdict (R. 118–119). Thus, while the court made the key factor possession, it did not equate that fact with the gist

of the offenses, but merely advised the jury that the ultimate elements of the offenses could be inferred therefrom.

2. There was no greater emphasis on possession than the statutes require. But if there had been, it could not have injured petitioner. At most, by emphasizing possession the court limited the jury's consideration of both counts to the statutory presumptions and so removed from the case any consideration the jury might have given to petitioner's flight from the premises at 2:00 a. m. as evidence of his guilty knowledge. See *United States* v. *Heitner,* 149 F. 2d 105, 107 (C. A. 2); *United States* v. *Rosenberg,* 195 F. 2d 583, 600 (C. A. 2), certiorari denied, 344 U. S. 838. Moreover, as far as petitioner was concerned, the directive that the jury could not convict without finding possession had the effect of placing emphasis on petitioner's alibi defense. Petitioner did not attempt to explain or justify an admitted possession of the narcotics but contended that he was never at the raided premises and never possessed of the heroin there found. Significantly, at the conclusion of the court's charge, counsel for petitioner announced that he had "no exceptions," apparently recognizing that the charge was as favorable to his clients' cases as he could expect.

3. Petitioner's further challenge to the instructions, first, that the trial judge directed the jury to return a conviction on proof of possession (Pet. Br. 30), and, second, that the jury under the instructions could have found any one of the defendants guilty, includ-

ing petitioner, if they found that any one of them had possession of the heroin, are without merit.

The first attack is baseless since the judge did not direct that the jury must convict on a showing of possession. Thus, as to count 2, he specifically charged the jury that if they found unexplained possession they "would be authorized" to convict (R. 111). Although, as to count 1, he advised that if the jury found the defendants possessed of narcotics "You will find" them guilty and "Unless you so find, you will find the defendants, and each of them, not guilty," he was not issuing a mandatory directive, for this phraseology was immediately preceded by the statement that "possession shall be prima facie evidence of a violation" (R. 110–111). Against this background, his use of the word "will" was nothing more than a short-hand manner of expressing the inference the jury could draw from possession in a case in which the defense made no attempt to justify or explain that possession.

As to the second challenge, nowhere did the trial judge instruct that if any one co-defendant had possession all could be convicted. Rather, the court charged, "* * * you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2" (R. 111); and "* * * each of the two counts of the indictment constitute a separate charge, and each count of the indictment should be considered by you in arriving at the guilt or innocence of each defendant separately" (R. 118).

4. While there are exceptions to the normal rule set forth in Rule 30, F. R. Crim. P. that "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection" (see *Screws* v. *United States,* 325 U. S. 91, 107), they do not apply here. As we have observed, the instructions were fairly in accord with the mandate of Congress and, if anything, more favorable to petitioner than his case warranted. He should not now be allowed to complain when at the trial, in response to direct inquiry by the trial judge, and with full opportunity to do so, his counsel chose not to complain. Cf. *Johnson* v. *United States,* 318 U. S. 189, 200.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 11.

NATHANIEL HARRIS,
Petitioner,
v.
UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 11.

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

Petitioner prays that this Court grant rehearing of its decision of March 2, 1959, affirming the judgment of the Court of Appeals and to grant him a rehearing for the following reasons.

REASONS FOR GRANTING A REHEARING.

The court finds that in order to take advantage of the presumption of §4704(a) it is necessary to prove the requirement that the narcotic was unstamped as well as in

defendant's possession while in order to use the § 174 presumption, possession alone is necessary. But this conclusion overlooks the fact that if a narcotic is stamped, it is legally possessed and it would then be irrational to presume a violation. The absence of a stamp shows the illegal character of illicit narcotics. Conversely, the presence of a stamp would identify the narcotics as legal. Therefore, both presumptions may only arise from possession of an unstamped package. The court also concludes there was direct evidence of an unstamped package from which a purchase had been made. But under the first count all three defendants were charged with purchasing the narcotics from an unknown person. They were not charged with purchasing narcotics from each other. There is no elemental requirement that narcotics remain in the original stamped package except upon purchase, sale, dispensation or distribution. The jury could therefore not determine from the narcotics introduced in evidence whether or not such narcotics were purchased from a stamped package.

We think that the difference between the two counts are merely verbal without a practical significance. There is no factual distinction between possession and receipt and concealment. Furthermore, heroin may not be legally imported and there are no stamped packages containing heroin.

We have just demonstrated that the presumptions are applicable only if the narcotics are unstamped. The **Blockburger** test is thus applicable but in effect it has been overruled sub silentio. The statement of the rule is as follows: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." The court's opinion has analyzed Blockburger

and has attempted to show that there are "two distinct statutory provisions" involved. But **Blockburger** only has application if the same "act or transaction" constitutes a violation of "two distinct statutory provisions."

We believe the court is in error in concluding that in the **Gore** case resort to the statutory presumptions were made to establish the counts other than the written order violation. The evidence presented was that a federal narcotics agent went to the defendant's apartment and arranged a purchase of narcotics and that "petitioner left the apartment and returned about an hour later and delivered the narcotics to the agent in an unstamped envelope." Govt. Br., **Gore v. United States**, p. 4. Thus, the direct evidence showed a sale from an unstamped package as well as the transportation of the narcotics.

Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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